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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 10, 1992

SOUTHWESTERN BELL CORPORATION FILES ERRATA TO ITS DECEMBER 31, 1991 COST ALLOCATION MANUAL REVISIONS

PUBLIC COMMENT INVITED

On January 30, 1992 Southwestern Bell filed an errata to its quarterly cost allocation manual update dated December 31, 1991. This filing is pursuant to the Memorandum Opinion and Order in the matter of *Southwestern Bell Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs*, File Number AAD 7-1964, released on January 29, 1988.

Parties may file comments on proposed revisions contained in the errata no later than **March 9, 1992.** Replies should be filed by **March 24, 1992.** Comments should reference AAD 92-15. A copy of each pleading should be sent to Tom Petras, FCC, Common Carrier Bureau, 2000 L ST., N.W., Room 812, Washington, D.C. 20554, and the Downtown Copy Center (DCC), 1114 21st ST. N.W., Washington, D.C. 20036, (202)452-1422. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L St., N.W., Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Tom Petras, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HUGHES COMMUNICATIONS GALAXY, INC. File No. 22-DSS-STA-91

Application for Special Temporary Authority for the Galaxy V-W Domestic Fixed-Satellite

ORDER

Adopted: January 31, 1992; Released: February 10, 1992

By the Domestic Facilities Division:

1. Hughes Communications Galaxy, Inc. (Hughes) has requested special temporary authority to operate its Galaxy V-W domestic fixed-satellite at 135^0 W.L. for an eight-week period, commencing upon launch, to test the satellite. No oppositions or comments were filed. For the reasons discussed below, this request is granted.

2. Galaxy V-W has been authorized as a replacement for Hughes' Westar V satellite, which is operating at the 125^0 W.L. orbital location.[1] Hughes plans to launch Galaxy V-W by April 1992[2] and anticipates that Westar V will still be operating. Prior to commencing regular operation, Galaxy V-W needs to be tested. Hughes anticipates that this testing process will take approximately four to eight weeks. Hughes indicates that it would not be feasible to test Galaxy V-W at 125^0 W.L. while Westar V is still operating because it would cause service disruption to customers on Westar V.

3. Hughes states that the most feasible testing location for Galaxy V-W is 135^0 W.L. The 135^0 W.L. location is currently assigned to GE American Communications, Inc.'s (GE Americom's) Satcom C-4 domestic fixed-satellite. However, Satcom C-4 is not scheduled for launch until 1993. In addition, Hughes does not anticipate that testing Galaxy V-W at 135^0 W.L. will adversely affect the operation of adjacent satellites, specifically, Hughes's Galaxy I at 133^0 W.L. and GE Americom's Satcom C-1 at 137^0 W.L. Hughes states that it has been coordinating this testing with GE Americom and will continue to work with GE Americom on this process.

4. Hughes states that it will cease operations of the Galaxy V-W in the remote event that testing does cause interference until the interference issues are resolved or the satellite can be moved to another location west of 135^0 W.L. to complete the testing process. Hughes will promptly move the Galaxy V-W satellite to its assigned 125^0 W.L. location upon completion of testing.

5. Granting the Hughes request will serve the public interest, convenience and necessity. The proposed testing location will allow Hughes to continue to provide service to its Westar V customers while insuring that the replacement satellite for the Westar V is fully operational before placing it into service. In addition, no party has objected to Hughes' request. We therefore grant this request.

6. Accordingly, IT IS ORDERED that Application File No. 22-DSS-STA-91 IS GRANTED.

7. IT IS FURTHER ORDERED that Hughes Communications Galaxy, Inc. IS AUTHORIZED to test Galaxy V-W at the 135^0 W.L. orbital location for an eight week period after it is launched. At the expiration of this period, it must begin to move the satellite to its regularly assigned location of 125^0 W.L.

8. IT IS FURTHER ORDERED that no harmful interference shall be caused to any other lawfully operated radio station and Hughes Communications Galaxy, Inc. shall cease operation immediately upon notification of interference.

9. IT IS FURTHER ORDERED that Hughes Communications Galaxy, Inc. shall notify the Commission in writing no later than seven days after the testing is completed.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[1] *See* Hughes Communications Galaxy, Inc., 3 FCC Rcd 6989 (1988) and Letter to Counsel, Hughes Communications Galaxy, Inc. from Chief, Domestic Facilities Division (July 14, 1989).

[2] *See* letter to Counsel, Hughes Communications Galaxy, Inc. from Chief, Domestic Facilities Division (January 30, 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT
COMMUNICATIONS COMPANY
LIMITED PARTNERSHIP
Complainant,

v. File No. E-90-126

THE CHESAPEAKE AND
POTOMAC TELEPHONE COMPANIES,
NEW JERSEY BELL TELEPHONE
COMPANY, THE BELL TELEPHONE
COMPANY OF PENNSYLVANIA and
THE DIAMOND STATE COMPANY.
Defendants.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: January 31, 1992; Released: February 10, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On March 15, 1990, US Sprint Communications Company Limited Partnership (hereinafter "Sprint") filed the above-captioned formal complaint against The Chesapeake and Potomac Telephone Companies, New Jersey Bell Telephone Company, The Bell Telephone Company of Pennsylvania and The Diamond State Telephone Company (hereinafter the "Defendants") seeking recovery of damages for the Defendants' alleged overearnings on interstate access services for the period January 1, 1987 through December 31, 1988. In accordance with Commission rules governing formal complaint proceedings, the Defendants filed an answer to the complaint.

2. The parties to the above-captioned complaint have conducted discussions aimed at settling the complaint. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies was reached. On January 9, 1992, the parties filed a joint motion seeking dismissal of the complaint. We are satisfied that dismissal of the the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the joint motion to dismiss the above-captioned complaint IS GRANTED and that the proceeding IS TERMINATED.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION — File No. I-T-C-90-133

Application for authority pursuant to Section 504(c) of the International Maritime Satellite Telecommunications Act of 1978 and Section 214 of the Communications Act of 1934, as amended, to interconnect facilities with American Telephone and Telegraph Company for the provision of Inmarsat aeronautical satellite communications services, in addition to other authorized Inmarsat

ORDER AND AUTHORIZATION

Adopted: January 31, 1992; Released: February 10, 1992

By the Chief, International Facilities Division:

1. On June 13, 1990, the Communications Satellite Corporation, World Systems Division (Comsat) filed the above-captioned uncontested application pursuant to Section 504(c) of the International Maritime Satellite Telecommunications Act (Inmarsat Act) and Section 214 of the Communications Act of 1934, as amended. Comsat requests authority to interconnect its authorized mobile communications services provided via the Inmarsat system, including Comsat's Inmarsat aeronautical mobile satellite services (AMSS), with the public switched telephone network facilities furnished by American Telephone and Telegraph Company (AT&T).[1]

2. Comsat states that it currently offers maritime satellite communications services to and from ship earth stations via Inmarsat satellites and Comsat's coast earth stations and switching facilities, and that it will soon introduce Inmarsat AMSS to aircraft in international flight. AT&T provides authorized telecommunications services to domestic U.S. subscribers, and operates telecommunications channels jointly with various foreign administrations and carriers for the furnishing of its authorized services between points in or served via the United States and points outside of the United States. Comsat plans to extend its authorized services domestically and abroad by interconnecting with AT&T. This will allow the exchange of the full spectrum of Comsat's authorized Inmarsat mobile services, including AMSS and Atlantic Ocean Region-East and Atlantic Ocean Region-West operations, with AT&T's public switched telephone network. AT&T plans to interconnect its facilities with Comsat's Mobile Satellite Switching Centers designated in Comsat's tariffs.

3. Comsat notes that the subject AT&T agreement replaces one approved by the Commission in 1982. Comsat states that the terms and conditions of the AT&T agreement are similar, in all material respects, to other mobile telephone interconnection agreements entered into by Comsat pursuant to FCC authorization. Comsat further states that the grant of the application is consistent with all pertinent Commission policies and that it will facilitate the early availability of AMSS via Inmarsat which, in turn, will promote flight safety, airline operational efficiency, and satisfaction of air passenger communications requirements.

4. The Inmarsat Act provides for an overall operational scheme for extending maritime satellite services within the United States. The Act permits only Comsat to own and operate the United States share of jointly-owned international space segment and ancillary facilities established to provide maritime satellite services. It provides that Comsat may own and operate satellite earth stations in the United States, but that the Commission may authorize ownership of earth stations by entities other than Comsat if a determination is made that such additional ownership will enhance the provision of maritime satellite services in the public interest. The Act specifically requires Comsat to interconnect its earth stations with the facilities and services of United States domestic and international carriers, as authorized by the Commission.[2] In recognition of the fact that maritime satellite services in the United States would be an extension of existing communications services offered on a competitive basis by a number of carriers, and that these carriers would provide customer access to the satellite system by means of their on-shore networks, the Commission adopted a general policy permitting any United States domestic or international carrier to seek authorization to provide terrestrial access to the maritime satellite system by direct interconnection with Comsat.[3] The Commission noted that exclusive arrangements for exchange of traffic between Comsat and shore-end carriers would reduce the competitive pick up and delivery of traffic and impair customer choice: thus, it required Comsat to accord shore-end carriers nondiscriminatory treatment with respect to terms of interconnection and exchange of traffic.[4]

5. Upon review of the subject application interconnection agreement, we find that grant of the application will service the public interest convenience and necessity.

6. Accordingly, IT IS ORDERED that application File No. I-T-C-90-133 IS GRANTED, and Comsat is authorized to interconnect with AT&T for the exchange of traffic between AT&T's public switched telephone network and Comsat's authorized mobile communications services provided via the Inmarsat system, including Comsat's Inmarsat aeronautical mobile satellite services.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for Reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Annex A of the "Service Agreement between American Telephone and Telegraph Company and Communications Satellite Corporation for Mobile Satellite Telephone Services" dated May 4, 1990 (agreement), which is appended to the subject application, indicates that Comsat and AT&T will also interconnect for the provision of international land mobile satellite services. Comsat's pending application File No. I-T-C-91-139 requests authority to provide international land mobile satellite services via Inmarsat satellites.

[2] Section 503(g) of the Act requires the Commission to determine the operational arrangements under which Comsat will interconnect with United States domestic or international carriers, and with private communications systems, for the purpose of extending maritime satellite service.

[3] *Implementation of Requirements of the International Maritime Satellite Communications Act*, 71 FCC 2d 1069 (1979).

[4] *See* 71 FCC 2d at 1081.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP — File No. I-T-C-92-006

Application for authority to lease and operate facilities for direct service between the U.S. and Czechoslovakia.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: January 31, 1992; Released: February 10, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Czechoslovakia by US Sprint Communications Company Limited Partnership (US Sprint).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-006 IS GRANTED, and US Sprint is authorized to:

a. lease and operate 30 voice-grade circuits between US Sprint's New York office and the TAT-8 cablehead in Tuckerton, New Jersey;

b. lease a one-half interest in and operate 30 voice-grade circuits in the TAT-8 cable from Tuckerton, New Jersey to Pen march, France;

c. lease a one-half interest in and operate necessary overseas connecting facilities from Pen march, France to Czechoslovakia[1]; and

d. use said facilities to provide US Sprint's regularly authorized services, including switched voice service, between the U.S. and Czechoslovakia and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between US Sprint and its correspondent in Czechoslovokia, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] US Sprint indicates that its correspondent in Czechoslovakia has agreed to provide all required matching facilities, including one half of all costs associated in TAT-8, and in leased terrestrial digital facilities.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP — File No. I-T-C-92-005

Application for authority to acquire and operate facilities for service between the U.S. and Kenya.

Application for authority to acquire and operate facilities for service between the U.S. and Nigeria. — File No. I-T-C-92-007

Application for authority to acquire and operate facilities for service between the U.S. and Bulgaria. — File No. I-T-C-92-008

ORDER AUTHORIZATION AND CERTIFICATE

Adopted: January 31, 1992; Released: February 10, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Kenya, Nigeria and Bulgaria by US Sprint Communications Company Limited Partnership (US Sprint).

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-92-005, I-T-C-92-007 and I-T-C-92-008 ARE GRANTED, and US Sprint is authorized to:

a. lease from Comsat and operate 30 voice-grade satellite circuits between the Etam, West Virginia earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and earth stations in Kenya and Turkey furnished by US Sprint's correspondents in Kenya and Bulgaria;

b. lease from AT&T and operate 30 voice-grade circuits in the Etam earth station;

c. lease and operate 30 voice-grade circuits between the Etam earth station and US Sprint's New York office; and

d. lease and operate 12 half-circuits in microwave facilities between Ankara earth station in Turkey and Bulgaria[1];

e. use the facilities in a, b, c and d above to provide US Sprint's regularly authorized services, including switched voice service, between the U.S. and Kenya (18 circuits) and Bulgaria (12 circuits) and beyond;

f. lease from Comsat and operate 45 voice-grade satellite circuits between Orion's Shenandoah, Virginia earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Nigeria furnished by US Sprint's correspondent;

g. lease from Orion and operate 45 voice-grade circuits in the Shenandoah earth station;

h. use the facilities in f and g above to provide US Sprint's regularly authorized services, including switched voice service, between the U.S. and Nigeria and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreements between US Sprint and its correspondents in Kenya, Nigeria and Bulgaria and copies of the agreements shall be filed with the Commission within 30 days of their executions.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] US Sprint indicates that its correspondent in Bulgaria will be responsible for all matching facilities, including facilities between Turkey and Bulgaria.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

EFC SATELLITE SERVICE, INC. File No. I-T-C-92-019

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to provide International Business Service, International Digital Route Service, DataNet Service and International Television Service via INTELSAT satellites and service not interconnected with the public-switched network via the Pan American Satellite system

ORDER AND AUTHORIZATION

Adopted: January 30, 1992; Released: February 10, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned unopposed application, filed October 23, 1991 pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the public convenience and necessity requires a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-019 IS GRANTED, and EFC Satellite Service, Inc. is authorized to establish channels of communications between appropriately licensed earth stations in the U.S. and INTELSAT Atlantic Ocean Region ("AOR") and Pacific Ocean Region ("POR") satellites for the provision of IBS and International Television Service between the U.S. and countries listed in Comsat's tariff F.C.C. No. 103 for the space segment of IBS and International Television Service.

3. IT IS FURTHER ORDERED that EFC Satellite Service, Inc. is authorized to establish channels of communications between appropriately licensed earth stations in the U.S. and INTELSAT AOR and POR satellites for the provision of International Digital Route Service and DataNet service between the U.S. and Venezuela, Chile, Brazil, Argentina, Guatemala, Costa Rica, Peru, Nicaragua, Mexico, El Salvador, Bolivia and Honduras.

4. IT IS FURTHER ORDERED that EFC Satellite Service, Inc. is authorized to establish channels of communications between appropriately licensed earth stations in the U.S. and the PAS-1 satellite for the provision of service not interconnected with the public switched network, including private line service, between the U.S. and those countries which PAS is authorized to serve, not to exceed one T-1 circuit to each country.

5. IT IS FURTHER ORDERED that EFC Satellite Service, Inc. is restricted in its communications with the PAS-1 satellite to the provision of capacity through the sale or long-term lease (at least one year) of transponder capacity for communications not interconnected with the public switched message networks (except for emergency restoration services).

6. IT IS FURTHER ORDERED that authorization to use the PAS-1 satellite is subject to Commission jurisdiction over the use of all space segment within the PAS system to ensure compliance with the restrictions placed on the operation of separate satellite systems.

7. IT IS FURTHER ORDERED that the authority granted herein for the EFC Satellite Service, Inc. to establish channels of communication between the earth stations in the U.S. and the PAS-1 and INTELSAT satellites does not dispense with the requirement that all such earth stations must be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites.

8. This authorization is not to be construed as permitting the provision of any services between earth stations located within the U.S.

9. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between EFC Satellite Service, Inc. and its correspondents, and a copy of any agreement shall be filed with the Commission within 30 days of its execution.

10. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

11. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

12. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of this Order's public notice date (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition to Amend Section 97.311(b) of the Amateur Service Rules — RM-7673

ORDER

Adopted: February 3, 1992; Released: February 10, 1992

By the Chief, Special Services Division:

1. On February 25, 1991, Whitman E. Brown filed a petition (RM-7673) to amend Section 97.311(b) of the Commission's Rules, 47 C.F.R. § 97.311(b). Specifically, the petitioner requests that we delete the provision that states that unintended triggering of repeaters by amateur service stations transmitting a spread spectrum (SS) emission is not considered to be harmful interference. His concern is that if numerous stations transmit SS emissions, many repeaters could be rendered unusable. Six comments in support of the petition were received.[1]

2. The compatibility of amateur stations transmitting an SS emission in the same frequency segment with amateur stations transmitting other emission types was addressed in the *Report and Order* in Gen. Docket No. 81-414, 50 Fed. Reg. 23425 (1985). In that proceeding the Commission decided to limit those stations transmitting SS emissions to frequencies above 420 MHz and, otherwise, to rely on the amateur service's tradition of cooperation and frequency sharing to reduce the interference potential.

3. In view of the Commission's consideration of this issue in Gen. Docket No. 81-414, we believe that implementation of the petitioner's request is unnecessary. Further, the likelihood of significant numbers of repeaters being rendered unusable due to unintended triggering by SS transmissions is remote. The facts that we have received very few complaints of interference from SS transmissions and that only six comments supporting this proposal were filed reinforce our conclusion that unintended triggering of repeaters by amateur stations transmitting a SS emission is not a significant problem in the amateur community. Additionally, there are many other methods available to prevent unintended triggering of repeaters. Our policy of relying on the tradition of cooperation and frequency sharing in the amateur service, therefore, still appears appropriate in this case.

4. In view of the above, we conclude this proposal is not in the public interest and does not warrant consideration by the Commission at this time. Accordingly, pursuant to Section 1.401(e) of the Commission's Rules, 47 C.F.R. § 1.401(e), IT IS ORDERED that the Petition for Rule Making, RM-7673, filed by Whitman E. Brown IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Robert H. McNamara
Chief, Special Services Division

[1] Comments in support of the proposed change were received from Whitman E. Brown, Roger T. Burr, William J. Leahy, Robert Peters, Alan Silverstein, and Marshall D. Spiller.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PAGE AMERICA OF NEW YORK, INC. File No. 22971-CD-P/ML-01-90

For facilities in the
Public Land Mobile Service
at Meriden, Connecticut
for station KAD510

MEMORANDUM OPINION AND ORDER

Adopted: February 5, 1992; Released: February 10, 1992

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. Paging Associates Inc. (Paging Associates) filed a petition to deny the Page America of New York, Inc. (Page America) application to establish a facility in the Public Land Mobile Service (PLMS) at Meriden, Connecticut. Page America's application for the 454.600 MHz frequency was set for lottery with the mutually exclusive Paging Associates application. Page America won the lottery.[1] Paging Associates then filed a supplement to its pre-lottery petition to deny, and a reply. Page America filed responsive pleadings. For the reasons set forth below, we deny Paging Associates's petition to deny, and grant Page America's application.

II. DISCUSSION

2. Paging Associates argues that Section 22.22 of the rules bars Page America from filing its application for the subject 454.600 MHz facility at Meriden, Connecticut.[2] Paging Associates contends that the instant Page America application for frequency 454.600 Mhz is a "repetitious application" in violation of Section 22.22 because it was filed prior to the date of the Commission's final action dismissing a similar Page America application for paging services on frequency 454.525 Mhz also at Meriden, Connecticut.[3] The Page America application for frequency 454.525 Mhz was filed on December 27, 1989, under call sign KNKM773 (File No. 21900-CD-P/L-90). The Commission granted Page America the license, but Page America subsequently requested that its application be dismissed. The Mobile Services Division (MSD) granted the request, dismissing the Page America 454.525 MHz application by public notice released on February 6, 1991.[4] The instant 454.600 Mhz application was initially filed by the NYNEX Paging Company (NYNEX) on February 15, 1990, pursuant to a two-step pro forma partial assignment culminating in Page America's possession.[5] Paging Associates argues that the events surrounding Page America's voluntary dismissal of its application for frequency 454.525 Mhz afforded Page America "an opportunity for a hearing" within the meaning of Section 22.22. Paging Associates concludes that Section 22.22 bars Page America from applying for the subject 454.600 MHz frequency at Meriden, Connecticut because it is for essentially the "same service to the same area" as the voluntarily dismissed authorization for frequency 454.525 MHz, also at Meriden, Connecticut.

3. Paging Associates argues in its supplemental pleadings that, even if a Section 22.22 violation has not occurred, other defects in the Page America application require its dismissal. Paging Associates alleges that: (i) no traffic loading study was filed to justify a request for an additional channel; (ii) Page America is attempting to warehouse frequencies; and (iii) Page America has entered into a conspiracy with NYNEX, by virtue of the pro forma partial assignment, in order to mislead the Commission.

4. In response, Page America asserts that Section 22.22 of the rules does not apply in this case, arguing that its voluntary dismissal of its authorization for 454.525 MHz did not constitute a "hearing" within the meaning of that section. Page America concludes that it is not prohibited from applying for the 454.600 MHz facility at Meriden, Connecticut. Page America further argues that the Paging Associates supplement to its initial petition to deny was an unauthorized attempt to replead its case, in violation of Section 1.45 of the rules.[6] Page America also denies the allegation that it entered into a conspiracy with NYNEX.

5. We first address Paging Associates's supplemental petition. Because the pleading raises new matters, pursuant to Section 1.45 of the rules, we dismiss it. Even were we to consider it, however, we cannot find support for the allegations that Page America warehoused frequencies, conspired with the assignor of the instant frequency, or attempted to mislead the Commission by voluntarily dismissing one application and filing the instant one. In order to find intentional misrepresentation, there must be evidence showing "deceptive intent." *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983). Page America explained that it did not become aware of the pendency of the instant 454.600 MHz application until it appeared on a lottery notice on January 23, 1991, since the application was originally filed by NYNEX in the wake of the consummation of the assignment of several facilities to Page America under call sign KAD510, among others.[7] Page America subsequently filed letters notifying the Commission of the assignment of the 454.600 MHz application from NYNEX, and correcting the lottery notice to indicate that Page America was the actual applicant.[8] Having realized that it had two applications pending at Meriden, Page America immediately filed to dismiss its 454.525 MHz application on January 25, 1991.[9] Paging Associates has failed to rebut this explanation, and its allegations of conspiracy and intentional misrepresentation are otherwise wholly unsupported by the record.

6. We also reject Paging Associates's supplementary allegation that the instant application should be dismissed because it lacks a loading study. Under Section 22.516 of the rules, an application for an additional frequency to an existing two-way station must include a loading study. Page America should have submitted a loading study because the instant application was filed in the same service area as the then still-pending 454.525 MHz application at Meriden. However, the omission is so slight that we waive the loading study requirement. 47 C.F.R 22.19(a)(i). Waiver is justified if application of a rule would frustrate its underlying purpose, or if grant of a waiver is otherwise in

the public interest. *Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972). The purpose of the loading study requirement is to ensure that the applicant truly needs the additional frequency and is not simply trying to warehouse it. *Regulatory Policies and Procedures for the Domestic Public Land Mobile Radio Service*, 53 Rad. Reg. 2d (P&F) 191, 193 (1983). There is no indication that Page America was willfully warehousing frequencies where it voluntarily dismissed its 454.525 MHz application once it discovered the pendency of the instant application, see *supra* at note 7. We find that waiver of the loading study requirement for the instant application is in the public interest where to require Page America to refile would be both redundant and inutile. *See Lou Goldstein d/b/a West Florida Communications*, DA 90-1273 (October 1, 1990).

7. We now turn to whether Page America was "afforded an opportunity for hearing" within the meaning of Section 22.22 of the rules, and is therefore precluded from filing its application. The purpose of Section 22.22 is to prevent the needless administrative burden of repetitious applications where one application has already been rejected after a full trial-type hearing. Section 22.22 of the rules was derived, in pertinent part, from Section 21.22 of the Domestic Public Fixed Radio Services Rules, 44 F.R. 60532, 60533 (October 19, 1979), and cases decided under the predecessor statute are, therefore, relevant here. The Commission has narrowly restricted Section 21.22, holding that it "is only applicable 'after hearing or default'...." *Houston Mobilfone Inc.*, 52 FCC 2d 473, 475 n.6 (Review Board, April 18, 1975). The language of Section 22.22 also explicitly provides that dismissal with prejudice of a "repetitious application" is justified only "after hearing or default" has occurred.[10] There was no hearing or default in the case involving the 454.525 MHz frequency, and voluntary withdrawal of an authorization does not constitute "an opportunity for a hearing."[11] Paging Associates's argument is unavailing because it would force every mutually exclusive applicant who has sought dismissal of its application, in order to settle a frequency conflict, either to wait one year or abandon the settlement. Such a Hobson's choice is inimical to the public interest because it would hinder the Commission's goal of promoting efficiency and innovation in the allocation, licensing and use of the electromagnetic spectrum. In sum, we find that Page America is not prevented by Section 22.22 of the rules from filing its 454.600 MHz application.

III. CONCLUSION

8. For the reasons discussed above, we conclude that Page America's application is in compliance with Commission rules where applicable and should be granted. Further, we find a grant of the Page America application to be in the public interest and that it would promote the efficient provision of service to the public.

IV. ORDERING PARAGRAPHS

9. Accordingly, IT IS ORDERED THAT the Application of Page America of New York for file number 22971-CD-P/ML-01-90, for frequency 454.600 MHz IS GRANTED.

10. IT IS FURTHER ORDERED THAT the Petition to Deny filed by Paging Associates, Inc. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Public Notice, Mimeo No. 12170, *Public Mobile Service Lottery PMS-41* (released March 14, 1991).

[2] Section 22.22 provides:

> (a) Where an applicant has been afforded an opportunity for a hearing with respect to a particular application for a new station, or for an extension or enlargement of a service or facilities, and the Commission has, after hearing or default, denied the application or dismissed it with prejudice, the Commission will not consider a like application involving service of the same kind to the same area by the same applicant, or by his successor or assignee, or on behalf of or for the benefit of the original parties in interest, until after the lapse of 12 months from the effective date of the Commission's order. The Commission may, for good cause shown, waive the requirements of this section . . . .

[3] Under Section 22.22 twelve months must lapse from the effective date of the Commission's order on a prior similarly situated application before a new application may be filed. *Id.*

[4] Paging Associates argues that the Page America dismissal of its 454.525 MHz application was ineffective because the letter requesting dismissal was not filed until after the application had already been granted. We disagree. The Page America dismissal was effective, and the grant of the application was inadvertent. The Page America application was granted on January 30, 1991. Public Notice, Report No. PMS-91-18-A (released Jan. 30, 1991). But the Page America letter dismissing its application is dated January 25, 1991 -- five days before the grant was announced on January 30, 1991. Letter from Steven L. Sinn, President of Page America, to Donna R. Searcy, Secretary, FCC (January 25, 1991). Moreover, the public notice verifying the Page America dismissal emphasized that it was ". . . per applicant's letter dated January 25, 1991." Public Notice, Report No. 91-19-A (released Feb. 6, 1991).

[5] The NYNEX Form 401 indicated that the instant application "to be licensed under Station KEC938 is the subject of a partial assignment of facilities to NYNEX Mobile Communications Company (NMCC) under station KAD510. In the wake of the grant of the partial assignment, the facilities of Station KAD510 are to be assigned to Page America of New York, Inc. . . . ." NYNEX application, Exhibit No. 6, Attachment A (filed February 15, 1990). The MSD subsequently authorized NYNEX Paging Company's consent to assignment of Station KAD510, *inter alia*, from NMCC (assignor) to Page America (assignee). Public Notice, Report No. PMS-90-26-A (released March 28, 1990) at 5 (File No. 21920-CD-AL-1-90). The same public notice announced that the Page America (then NYNEX) application for the instant frequency 454.600 MHz was acceptable for filing. *Id.* at 2.

[6] Section 1.45(c) allows additional pleadings only if the Commission has specifically authorized them. 47 C.F.R. 1.45(c).

[7] Lottery Notice, PMS-41-1 (released January 23, 1991).

[8] Letter from Steven L. Sinn, President of Page America, to Donna R. Searcy, Secretary, FCC (January 25, 1991) (notifying Commission of the assignment of the 454.600 MHz application); Letter from Glenn S. Rabin to Donna Searcy (February 7, 1991) (indicating that Page America should replace the name of NYNEX in the lottery notice for frequency 454.600 MHz).

[9] *See supra* note 4.

[10] Even the mere fact that two mutually exclusive applications have been *designated* for a hearing has been held to be an insufficient predicate to support the application of the "repetitious applications" prohibition. *Houston Mobilfone, supra.*

[11] *Comex, Inc.*, 64 Rad. Reg. 2d 1515 (P&F) (Com.Car.Bur., 1988) (comparative hearings were designed to give an existing carrier opportunity to demonstrate "extraordinary need" for a particular frequency as against the need of new applicant vying for same frequency; *citing, Southwestern Bell Telephone Co.*, Mimeo No. 3258 (released March 21, 1986)).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-323

In re Applications of

HS COMMUNICATIONS, INC.	File No. BPH-880505MZ
STACY C. BRODY	File No. BPH-880505NO
PAMELA R. JONES	File No. BPH-880505NR
CRAIG L. SIEBERT	File No. BPH-880505PM
INTRACOASTAL AIRWAVES LIMITED PARTNERSHIP	File No. BPH-880505PN

For Construction Permit for a
New FM Station on Channel 271A
in Virginia Beach, Virginia

Appearances

Barry A. Friedman and *Staci A. Rhodes* on behalf of HS Communications, Inc.; *Lauren A. Colby* on behalf of Stacy C. Brody; *Michael J. Wilhelm* on behalf of Pamela R. Jones; *Stephen Diaz Gavin* and *J. Jeffrey Craven* on behalf of Craig L. Siebert; *James J. Freeman* and *Stephen J. Cochilla* on behalf of Intracoastal Airwaves Limited Partnership; and *Y. Paulette Laden* on behalf of the Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: January 31, 1992; Released: February 13, 1992

1. Fourteen applications were designated for a comparative hearing for this facility. *Hearing Designation Order*, 5 FCC Rcd 3949 (M. M. Bur. 1990). There are five applicants remaining in this proceeding and the following issues which will be resolved in this decision:

1. To determine whether the proposals of the applicants would provide coverage of the city sought to be served as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant a waiver of that section.

2. To determine:

(a) Whether Pamela R. Jones is financially qualified to build and operate the proposed station;

(b) Whether Pamela R. Jones falsely certified her financial qualifications;

(c) And, in light of findings on these issues, whether Pamela R. Jones is qualified to become a Commission licensee.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

2. A prehearing conference was held September 10, 1990. *Memorandum Opinion and Order*, FCC 90M-2880, released September 14, 1990. Written testimony was exchanged on May 3, 1991. Oral examination of the testimony took place on May 21, 1991 (Tr. 22-178/224), May 22, 1991 (Tr. 225-505/524), May 23, 1991 (Tr. 525-817), and May 24, 1991. Tr. 818-893. Proposed findings and conclusions were filed by the applicants and Mass Media Bureau on July 16, 1991 and replies were filed by the applicants on May 24, 1991. *Order*, FCC 91M-1742, released May 30, 1991.

FINDINGS OF FACT

Issue 1: Whether the proposals of the applicants would provide coverage of Virginia Beach, Virginia as required by Section 73.315(a) and if not, whether a waiver of Section 73.315(a) should be granted.

3. The applicants predicted 70 d/b/u contours cover between 42.6 percent and 65.6 percent of the population of Virginia Beach. Jt. Engineering Exh., at 8. The population and area figures for Virginia Beach show that 98.1 percent of the population live in 50.4 percent of the city designated as urban area. Jt. Engineering Exh., at 7. The applicants assumed a terrain roughness factor of 50 meters. *Id.*, at 4. Because the terrain is flat and there are no obstructions, the applicants believe all of Virginia Beach will receive the required 3.16 mV/m signal. They also believe the entire city would come within the 70 d/b/u contour. The applicants could improve their coverage over the populated areas of Virginia Beach if they moved their sites in a north northwest direction. *Id.*, at 9. However, relocation of the antenna sites is prohibited because of the required separation with WRXL, Richmond, Virginia. *Id.* None of the applicants will provide service to unserved or underserved areas. *Id.*, at 13. The applicants will not provide city grade coverage to 80 percent or more of Virginia Beach when coverage is calculated pursuant to §73.313. *Id.*, at 8.

Issue 2: Whether Jones falsely certified her financial qualifications and whether she is financially qualified.

4. Pamela Jones, an individual applicant, states that, when she certified her financial qualifications, she relied on a "detailed cost estimate" and assurance from H. Loy Anderson, President and owner of the Florida National Bank. Jones Exh. 2, at 10. Jones also maintains that she relies on a "redundant" commitment from the

Mercantile-Safe Deposit and Trust Co. of Baltimore. *Id.* Jones provided Anderson with cost estimates for six stations and rough cost estimates for another 12 applications. Jones Exh. 2, at 4. Anderson gave Jones a letter, dated April 20, 1988, which provides for $1,334,403.00 for the first six stations. Jones Exh. 2, at 5. Her proposal for Virginia Beach was not included in the April 20, 1988 letter from Florida National Bank. Jones Exh. 2, at Attach. T and U; Tr. 367-70. Jones explained that the intention was to amend the bank letter to include additional proposals when their costs were determined. Jones Exh. 2, at 5. Jones concedes that the bank's letter was never amended to include her Virginia Beach proposal. Tr. 387. Jones claims that she did notify Anderson of the cost estimates for Virginia Beach. *Id.*

5. After Jones filed her application for Virginia Beach, she met with Michael Vaughan of Mercantile-Safe Deposit and Trust Co. to obtain financing for her broadcast proposals. Jones Exh. 2, at 9. In 1980, Jones, through a job she held in Baltimore, met the Chairman and CEO of Mercantile. *Id.*, at 6-7. He suggested she contact Vaughan because he handled loans to broadcast entities. *Id.*, at 7. Jones gave Vaughan some correspondence which included her letter from Florida National Bank, a financial statement, copies of applications, cost estimates, and market data. *Id.*, at 9. She also showed him a financial statement which indicated that her net worth was $600,000 with $250,000 of that amount in cash or cash equivalents. *Id.*, at Attachment JJ. The statement lists investments of $300,000 and investment income of $457,000, during the preceding 12 months. *Id.* Jones said Vaughan asked her questions (*Id.*, at 10) and then provided her with loan letters for eight proposals which total $1,894,549.50. *Id.*, at Attach LL-SS. The letter from Mercantile-Safe Deposit and Trust Co. for Virginia Beach provides "reasonable assurances of the availability of a term loan in the amount of $207,274.30." *Id.*, at Attach. PP. The letter to Jones, which is dated August 10, 1988, provides that the letter cannot be construed as a loan commitment and does not obligate the Mercantile-Safe Deposit and Trust Company "in any way." *Id.* The bank also requires Ms. Jones' full personal guarantee. *Id.* Jones did not amend her application to reflect the Mercantile financing. Tr. 357.

6. Jones' personal net worth on August 10, 1988 was $600,500. Tr. 371-72. She had promised by then to build 18 stations which she estimated would cost $1,898,549.58. Tr. 375.

Issue 3: Which proposals, on a comparative basis, would best serve the public interest.

HS

7. HS is a Virginia corporation organized on May 4, 1988. HS Exh. 1, at 1. HS has two stockholders, Manmohan S. Chawla, who owns 30 percent of the stock, and Harpal Chawla, who holds 70 percent of the stock. *Id.* Ms. Chawla stated at the hearing that she holds 7,000 shares and her spouse 3,000, but the corporate records indicate they own 700 and 300 shares respectively. Tr. 81, 93-96; Intracoastal Exh. 6. Ms. Chawla said that the split in HS' stock was intended to reflect the anticipated scope of her responsibilities based on the Chawlas' experience with their time-brokered radio show, the "Punjabi Community Hour." Tr. 88. That program did not air until February 1989. When HS was organized in 1988, no time brokerage agreement had been signed by HS nor had HS produced any programs. Tr. 88-89, 92-93. Ms. Chawla stated that she was aware of the preferences given women in the comparative process. Tr. 78-81.

8. Ms. Chawla is President of HS and Mr. Chawla is Secretary and the only director. HS Exh. 1, at 1; Tr. 97. Ms. Chawla could not recall how the officers were selected. Tr. 97. She believes the reason that she is not a director is because she may not be both president and a director. Tr. 98. Ms. Chawla stated that HS is non- profit and that it is registered with the IRS. Tr. 72. Mr. Chawla said that HS had not sought non-profit status and that Ms. Chawla helps him with HS' tax returns. Tr. 240. Ms. Chawla did not play any role in the organizing of HS. Tr. 72, 101, 105. Ms. Chawla does not remember having paid for her HS stock; she thinks that her spouse may have. Tr. 81-82.

9. Ms. Chawla's role in preparation of the proposal consisted of conversations with her spouse. Tr. 100-04. She learned about the availability of the channel from him. Tr. 40. Mr. Chawla went to the Commission's offices to obtain information about the availability of stations. Tr. 65. She said her spouse had worked with a Virginia attorney to incorporate HS. Tr. 72. Mr. Chawla said there was no Virginia attorney; he said William Friedman, HS' communications counsel, organized the corporation. Tr. 169-70. Mr. Chawla found HS' engineer and later introduced him to Ms. Chawla. Tr. 41, 101. He also found HS' counsel and arranged for the transmitter site. Tr. 53, 75. Ms. Chawla has never spoken to counsel without her spouse being present. Tr. 80. Ms. Chawla said they worked together on the budget but Mr. Chawla provided the salary estimates and the equipment estimates which he obtained from HS' engineer. Tr. 123.

10. HS obtained letters from Allied Financial Corporation and Signet Bank to support its financial certification. Tr. 279-80. The Allied letter is addressed to Ms. Chawla but she could not remember going to their offices. Tr. 48. Mr. Chawla went to Allied and Ms. Chawla did not accompany him. Tr. 165. Ms. Chawla could not recall at her deposition who signed the letter from Signet Bank or even whether the person she and her spouse met with at the bank was male or female. Tr. 49. Ms. Chawla could not remember how many checks she had signed for HS' expenses; while at her deposition, she said she had never signed any and her spouse had signed all checks relating to HS' application. Tr. 52-53. Mr. Chawla takes care of all bills and keeps the books and records of HS. Tr. 83, 127-28, 175. The costs are being paid from a joint account which contains the proceeds from their government salaries and joint investments. Tr. 246-47.

11. Ms. Chawla was unaware that she and her spouse had any real estate or stock investments. Tr. 55-56, 94. Mr. Chawla said that they own nine condominiums, six of which are held jointly. Tr. 231-32. Mr. Chawla said they manage their holdings together. Tr. 234-35. However, Mr. Chawla is sent the rent checks from the condominiums, he also pursues delinquent payments, and he rents the condominiums when they are vacant. Tr. 233-34.

12. Ms. Chawla claims to have been involved in the formation of HS' EEO program. Tr. 116-17. She was unaware that AWRT, which was a contact organization included in HS' EEO program, stood for American Women in Radio and Television. Tr. 144. Mr. Chawla did not know what the initials stood for either. Tr. 266. He thinks that HS' counsel listed AWRT in HS' EEO program. Tr. 265-66.

Integration of ownership and management

Quantitative integration proposal

13. Ms. Chawla proposes to work at the station 40 hours per week as the general manager. HS Exh. 3, at 1. She will be responsible for day-to-day operation of the station, supervision of all employees, development of programming, sales, and administrative policies. *Id.* Mr. Chawla will work 40 hours per week at the station as the sales manager. He will be responsible for the sales staff, establish and revise sales policy. *Id.* He will select and supervise the station's radio representation firm and supervise day-to-day sales operations. HS Exh. 3, at 1-2.

14. Mr. Chawla stated that, because he has no management experience in broadcasting, he would hire a station manager. Tr. 259-60. Ms. Chawla conceded that she has no management experience. Tr. 66. Ms. Chawla works as a personnel management specialist for the federal government, she has been employed by the government for eleven years. Tr. 36-37; HS Exh. 4, at 2. Mr. Chawla is a 13 year federal government employee; he works in the Office of Chief Engineer for the Department of the Navy. HS Exh. 5, at 1-2; Tr. 38. The Chawlas currently derive most of their income from their government jobs. Tr. 141. Ms. Chawla did not know whether she would receive a salary at the station and she has not discussed the matter with her spouse. Tr. 141-42. She said that she was counting on receiving retirement income from the federal government. Tr. 142. Ms. Chawla conceded, even though she states in her written testimony that she will set sales policy, that Mr. Chawla will actually set sales policy. Tr. 133. Mr. Chawla said that policy matters in other areas would be set jointly. Tr. 255-56. They would work as a team, Mr. Chawla said. Tr. 259. Although, he did say that over matters involving numbers he would have more authority. Tr. 259.

Qualitative attributes

15. The Chawlas will move to Virginia Beach if HS receives a grant. HS Exh. 4, at 3; HS Exh. 5, at 3. After HS filed its application, the Chawlas began a one hour program called the "Punjabi Community Hour" which is broadcast on Saturday and Sunday in suburban Washington, D.C. HS Exh. 4, at 2. The program is broadcast pursuant to a brokerage agreement with the stations, which Mr. Chawla negotiated. Tr. 60. He also handles the sales and financing for the program. Tr. 262. Mr. Chawla is also the program's producer. Tr. 59, 61. He is in charge. Tr. 63. Ms. Chawla is the voice for the show and claims to select the subject matter after consulting her spouse. Tr. 60, 63-64; HS Exh. 4, at 2. The program began in February 1989. HS Exh. 4, at 2. The Chawlas also made a "series" of video programs which were aired on a cable public access channel. *Id.* These programs were made in the late 1980s. Ms. Chawla is a female Asian American. HS Exh. 1, at 1. Mr. Chawla is also an Asian American. *Id.*

Diversification of mass media

16. HS and its owners have no mass media interests. HS Exh. 2, at 1.

Auxiliary power

17. HS will install auxiliary power but Ms. Chawla did not know whether there would be one piece of auxiliary equipment or two. HS Exh. 6, at 1; Tr. 137. The budget item, she said, that included auxiliary power equipment is labeled "malfunctioning." Tr. 134-35.

Brody

Integration of ownership and management

Quantitative integration proposal

18. Brody is an individual applicant. Brody Exh. 1, at 1. She proposes to work full time, 40 hours per week, as the general manager of the station. Brody Exh. 1, at 3. She will be responsible for the day-to-day operations of the station, hiring and firing of all personnel, community relations, development of the sales and programming policies, and administration of the station's EEO program. *Id.* Brody currently is employed at Brody's, a chain of three clothing stores in, or near, Greenville, North Carolina. Brody Exh. 1, at 2. Brody is a "Merchant-Advertiser-Buyer" at the stores. *Id.* The business is directed by Brody's spouse, Hyman Brody, and has been run by his family in Greenville for about 30 years. Tr. 297-98. Ms. Brody has promised to end her employment at the stores. Brody Exh. 1, at 2; Tr. 299. She currently works for Brody's from 9 to 20 hours a week. Tr. 299. She does not work during the summer months. *Id.*

19. Ms. Brody's father, Robert Copeland, told her about the Virginia Beach channel. Tr. 302. Mr. Copeland is a general partner in two entities that operate radio broadcast stations in Pennsylvania and he lives in Norfolk, Virginia. Brody Exh. 2. He recommended that she hire the communications counsel used by his stations. Tr. 303. He also recommended William Benns to do the engineering. *Id.* Ms. Brody stated that Mr. Benns did not charge her for his services because he did the work as a favor to her father. *Id.* Ms. Brody estimates that she had approximately 50 conversations with her father about the application. Tr. 304. She intends to rely on him for recommendations about who to hire. Tr. 328. She might also seek his advice on programming, although, in Brody's view, that is not an area he knows about and, therefore, she would consult other people first. *Id.* Her father has already helped her obtain a tower site. Tr. 303-04. In fact, the site is owned by him. *Id.* While Brody has no agreement with her father about the cost of renting or buying the site, she has asked him what the cost will be. Tr. 304.

20. Counsel filled in the application for Brody and she provided him with information for the application by telephone. Tr. 317-18. Ms. Brody did not see the application until it was ready for her signature. Tr. 318-19. While Ms. Brody has represented that she will administer the EEO program for the station, Brody did not file an EEO program with the Commission because it will employ only four full-time employees. Tr. 313-15. Ms. Brody said the station would operate 24 hours a day "but possibly going off the air some, between two and six, or something like that." Tr. 327-28. Brody did not prepare a written financial assessment before certifying her financial qualifications. She received cost estimates from her father and reviewed her bank statements to insure she could finance

the project. Tr. 305. Brody has paid all costs incurred in the pursuit of her application; she has not used any of her father's money. Tr. 316-17.

Qualitative attributes

21. Brody intends to move to Virginia Beach if she receives a grant of her application. Brody Exh. 1, at 1. She lived in Virginia Beach for one year, from July 1973 to July 1974, when she was 12 years old. *Id.*; Tr. 306. The Brodys have owned a house in Virginia Beach since March 1985. She represented in her written testimony that she occupies it six months of each year. Brody Exh. 1, at 1. In her application she claimed that she lived in Greenville, North Carolina nine months out of the year. Tr. 313. When examined, Brody said that by May of last year she had spent 21 days during 1991 in Virginia Beach. Tr. 295. She said she spent 150 days in 1990. *Id.* Ms. Brody cannot remember how many days she spent at her Virginia Beach address in calendar years 1989, 1988, 1987, 1986, and 1985. Tr. 295, 296. Brody also owns a house in Greenville. Brody Exh. 1, at 1; Tr. 293. She lives there with her spouse and two children, who are 2 1/2 and 10 months old. Tr. 294. Brody stated that she believes she and her children typically spend the summer months at her Virginia Beach residence and other days during the year. Tr. 297. Mr. Brody goes back and forth to Greenville. *Id.* Ms. Brody represents that her spouse will also move to Virginia Beach and that he is thinking about opening a store in the Virginia Beach area. Tr. 300-01. No plans have actually been made. Tr. 301.

22. Since 1978, Brody has belonged to the United Jewish Federation in Norfolk and she has been a member of a synagogue there since 1980. Brody Exh. 1, at 2; Tr. 307-10. She is not regularly active in either one. Tr. 307-08.

23. From June 1983 until January 1985, Brody was a sales representative at WMYK-FM, Moylock, N.C. Brody Exh. 1, at 2. The owner of the station was William Benns who prepared the engineering without charge for this application. Tr. 311. Brody is female. Brody Exh. 1, at 1.

Diversification of ownership of the mass media

24. Brody has no broadcast interests. Brody Exh. 2, at 1. Her father, Robert Copeland owns a 50 percent general partnership interest in Streco Communications which owns 39 percent of WMYG-FM, Braddock, Pennsylvania. Brody Exh. 2, at 1. He also owns a 33 percent general partnership interest in CBS Broadcast Group, which owns 15 percent of WMYG-FM, Braddock, Pennsylvania. *Id.* Brody's brother holds a permit for a new FM broadcast facility for Vinton, Virginia. *Id.*

Auxiliary power

25. Brody proposes to install and utilize auxiliary power equipment at her studio and transmitter sites. Brody Exh. 4, at 1.

Jones

Integration of ownership and management

26. Jones does not propose to work at the Virginia Beach facility. Jones Exh. 3; Tr. 387. She is the sole owner of the applicant. Jones Exh. 1, at 1.

Diversification of ownership of the mass media

27. Jones owns no mass media. Jones Exh. 1. She has, however, applied for two television stations and 18 FM stations. Tr. 394. The television applications were dismissed for cash payments. Tr. 395. Of the 18 FM applications, three are still pending. Tr. 396-97. She has never received a grant but, in the last 12 cases, she has received cash or a promise of cash. Tr. 401. Since 1987, she has received cash settlements in every year, except in 1989. Tr. 402-03. One year, she was paid $425,000. Tr. 416.

Auxiliary power

28. Jones proposes to install auxiliary power at the studio and transmitter site. Jones Exh. 4.

Siebert

Integration of ownership and management

Quantitative integration proposal

29. Siebert is an individual applicant. Siebert Exh. 1. He proposes to work full time, 40 hours per week, as the station's general manager. Siebert Exh. 2, at 1. He represents that he will be responsible for decisions relating to programming and personnel. *Id.* He will also give "primary attention" to sales and financial matters and he will implement and oversee the station's EEO program. *Id.*

30. Siebert intends to leave his position at Siebert & Company, an accounting firm in Annapolis, Maryland, which he operates with his brother, Keith. Siebert Exh. 1, at 1; Tr. 684. Siebert, who is a certified public accountant, represented at the hearing that accounting is currently his full-time job. Tr. 649. He said he spends 30 to 40 hours per week on his work (Tr. 667-68), although at his deposition he said he spends 25 hours per week. Tr. 668. He will retain his ownership in the company but he will not take any money from the firm. Tr. 670-71. At his deposition he said he would turn the business over to Keith Siebert if he receives a grant. Tr. 669. But at the hearing, when it was pointed out to him that Keith Siebert has promised the Commission that he will move to Colorado and work at a new station there, Siebert then said he would turn the business over to Barbara Subat who is an accountant in the firm, but not an owner. Tr. 669, 684. *See Evergreen Broadcasting Company*, 6 FCC Rcd 5599 (1991).

31. Previously, Siebert received a construction permit for a New Orleans television station. Tr. 657, 658. Siebert told the Commission when he applied for that facility that he would be the station's general manager. Tr. 658. However, he did not serve as general manager and he did not pursue the position. Tr. 658, 659. Instead, he let post hearing investors, who were not disclosed to the Commission in the application process, make decisions about who would operate the station. Tr. 659. Siebert is also President of Cell-Ventures, Ltd., which holds a cellular telephone permit for a rural Missouri market. Tr. 648-49. Siebert said he is "orchestrating various people" to construct the system. He will continue to direct the system's activities. Tr. 649.

Qualitative attributes

32. Siebert has promised to move to Virginia Beach to operate the station. Siebert Exh. 2, at 1-2. He has no other qualitative comparative attributes. *Id.*

Auxiliary power

33. Siebert proposes to install auxiliary power facilities at the studio and transmitter locations. Siebert Exh. 4, at 1.

Diversification of the mass media

34. Siebert has no mass media interests. Siebert Exh. 3, at 1. His brother and business partner, Keith Siebert, holds a construction permit for Evergreen, Colorado. Siebert and his spouse, Elizabeth, own 90 percent of the equity in Evergreen Communications Company, the permittee for Channel 243C at Evergreen, Colorado.

Intracoastal

35. Intracoastal is a limited partnership with one general partner, Jessie Haynes, who has a 20 percent interest, and three limited partners, Robert L. Haskins, who has a 55 percent interest, Thomas H. Barr, who has a 12.5 percent interest, and William E. Wrenn, Jr., who has 12.5 percent interest. Intracoastal Exh. 1, at 1. Intracoastal was organized by Robert Haskins. He heard that the Virginia Beach channel was available from Robert Blow. Tr. 699. Blow and Haskins met in 1986 at a cellular telephone meeting. Blow is an advisor, consultant, broker for the cellular telephone business; he has also been in the broadcast business. Tr. 696. Haskins was awarded three cellular telephone licenses. After he sold those licenses he invested in FM applications. Tr. 697-98. Blow told Haskins that the new FM frequencies provide a significant investment opportunity. Intracoastal Exh. 4, at 1. Blow and Haskins selected the markets which Haskins applied for. Blow was hired by Haskins to prepare the applications. Intracoastal Exh. 4, at 2. Blow selected the engineer, legal counsel, the general partner, and paid the FCC filing fee for Haskins' applications. Tr. 748. He also selected the transmitter site and obtained reasonable assurance of its availability for them. Tr. 723. Haskins believed Blow would select a general partner who would make a strong comparative showing because he knew what to look for. Tr. 744. Haskins knew that Blow would select, as a general partner, an African American female over a white male because "you get more points that way." Tr. 745. Blow charged Haskins a package price for each application. Tr. 729.

36. Haskins obtained a separate bank letter for each of his applications, although they were from the same bank. Tr. 739. The letters were all the same and provided that the assets of the limited partners would secure the loan. Tr. 720-21. The general partner's assets were not considered by the bank. Tr. 721, 722. The general partner in a Haskins' application typically invests $20 and contributes time to the partnership for her interest. Tr. 703-04. For example, Haynes paid $20 for her interest. She has kept the public file current, paid bills, acted as a point of contact for the proposal, and attended an NAB convention to learn about operating a station. Tr. 777. Haskins also paid for a local attorney for Haynes in order that she might have the partnership documents reviewed. Tr. 704.

37. Haskins met Haynes at his home in early 1988 before the application was filed. She had been referred by Blow. Intracoastal Exh. 4, at 1-2. That was their only meeting; they had no further communication. Tr. 765. When they met, Haskins did not ask Haynes any questions about her business experience or financial affairs. He relied on her resume. Tr. 752-54. Haskins does not know how Blow selected Haynes or why he selected her. Tr. 750-51. Haynes had a couple of questions for Haskins when they met but she did not negotiate her interest in the applicant. Tr. 757-58. She did not ask to see the limited partners' financial statements, she did not inquire about their assets and liabilities, and she did not find out about their character. Tr. 759, 761-62. She did not ask about financing for the proposal but she did insure that she would not be personally liable for any debt. Tr. 759-60. According to Haskins, the bank did not inquire about Haynes and her background; it was only interested in Haskins' financial ability. Tr. 742.

38. Although Haskins did not ask Haynes any questions, that is not how he normally acted when he selected a partner for his other businesses. Tr. 762. Usually, he selected partners after he had known them a long time and could rely on them. Tr. 763.

39. Even though Haynes is the general partner, she has no obligation to obtain financing. Tr. 771. However, under Intracoastal's partnership agreement, Haynes is expected to do her best to obtain financing for the station. Tr. 771. Haskins said that that part of the partnership agreement is not in effect in this partnership. Tr. 772. He said there may be other terms of the agreement which are not in effect in the Intracoastal partnership. *Id.* Money is provided to Intracoastal's bank account only in small amounts and Haynes is required to send for money to cover bills at least once a month. Tr. 773-74.

40. When Haynes met Haskins, Wrenn and Barr in March or April 1988 (Tr. 750), they discussed the compensation Haynes would receive at the station. Tr. 755. They decided they would pay her what other comparable managers would make. *Id.* But Haskins said the limited partners would make the ultimate determination on the salary of the general partner. Tr. 756. Haskins said that he participates in decisions about the partnership because he controls the funds. Tr. 736. The limited partners in Haskins partnerships have participated in assessment of settlement offers. Tr. 733-35. As a rule, the other partners rely on Haskins because he has the most invested. Tr. 736.

41. When the application was prepared, Haynes relied on Intracoastal's counsel to answer the application questions. Tr. 844-47. Haynes declared bankruptcy in April 1990. Tr. 836. She did not tell Haskins directly. Tr. 767. When Haskins heard about it, he was concerned. Tr. 768. He has never been told how it happened. Tr. 769. He does not know whether Haynes' bankruptcy reflects on her business judgment. Tr. 769-70. Haskins never talked to Haynes about her bankruptcy. Tr. 770.

Integration of ownership and management

Quantitative integration proposal

42. Haynes proposes to work full time, 40 hours per week, as the general manager. Intracoastal Exh. 3., at 3. She will be responsible for the day-to-day operations, implement the EEO program, and undertake public affairs, budget, programming, and promotional and marketing activities. *Id.*

Qualitative attributes

43. Haynes has promised to move to Virginia Beach if Intracoastal's application is granted. Intracoastal Exh. 3, at 4-5. Haynes lived in the Virginia Beach area from December 1985 to September 1990. Intracoastal Exh. 3, at 4.

From 1986 to 1990, she was involved with a local chapter of NAACP and the Hampton Roads Black Media Professionals; from 1986 to 1989, she assisted the Hampton Roads Chapter of the United Way; from 1986 to 1990, she undertook activities for the United Negro College Fund; in 1988 and 1989 she worked on fund raising for the Leukemia Society; during 1989, Ms. Haynes was a member of Tidewater Regional Purchasing Council and undertook various other civic activities. Intracoastal Exh. 3, at 5-6. Haynes is a female African-American. Intracoastal Exh. 3, at 4.

44. Haynes, from 1987-89, produced a cable talk show which included conversations with the mayor of Chesapeake, Virginia and a program which discussed local issues. Tr. 866-67; Intracoastal Exh. 3, at 7. The record does not reflect how many programs Haynes produced or participated in.

Auxiliary power

45. Intracoastal proposes auxiliary power at the studio and the transmitter. Intracoastal Exh. 3, at 7.

Diversification

46. Haynes has no mass media interests. Intracoastal Exh. 1. Barr, Haskins, and Wrenn are limited partners in JKRC Central Communication, Ltd. Partnership which was awarded a construction permit for Bishopville, South Carolina. Tr. 731-32.

Comparative coverage

47. There are at least seven existing aural services in the area which the applicants propose to serve. The following table lists the total areas and populations within each applicants' 1 mV/m contour.

TOTAL AREAS AND POPULATIONS

Applicant	Area (sq. km.)	Population
HS	1,197	368,153
Brody	938	363,582
Jones	955	346,068
Siebert	1,009	297,943
Intracoastal	1,208	387,009

CONCLUSIONS

Issue 1: None of the applicants will provide a 3.16 mV/m (70 d/b/u) signal over Virginia Beach but a waiver of Section 73.315(a) is warranted.

48. Section 73.315(a) requires that stations place a 3.16 mV/m signal over the community of license. The applicants for Channel 271A, Virginia Beach will cover between 42.6 and 65.6 percent of the population within the community. Because of restrictions by the FAA and the Commission's rules, the applicants cannot relocate to an area where they will provide city grade coverage to at least 80 percent of the community, when their coverage is computed pursuant to §73.313. However, the applicants point out in the joint engineering exhibit that the terrain is flat and without obstructions. The engineer who prepared the exhibit believes that actual city grade coverage may encompass all of Virginia Beach. The Mass Media Bureau, under the circumstances presented, supports the parties' request for a waiver. For these reasons, a waiver will be granted to all the applicants.

Issue 2: Jones falsely certified that she was financially qualified.

49. Jones certified that she was financially qualified when she filed her application. She relied on a letter from Florida National Bank which assured financing for other applications she had filed but did not include her application for Virginia Beach. The April 20, 1988 letter from Florida National Bank, on which Jones relies, recognizes that Jones intended to borrow money for additional broadcast proposals but the letter provided that the bank's willingness to lend for proposals not listed in the letter was dependent on Jones submitting cost estimates and the bank issuing an amended letter which would include the new application. Jones stated that she submitted the costs for Virginia Beach to H. Loy Anderson, President and owner of Florida National Bank but there is no testimony from Mr. Anderson to confirm her assertion and she concedes the bank's letter was not amended to include Virginia Beach. On these facts, it is apparent that Jones knew she had not secured financing for the Virginia Beach proposal when she certified. As is apparent from the Florida National Bank letter, Jones is very nearly a professional applicant before the Commission: she has applied for twenty broadcast frequencies. Although she has never been awarded a license, in the last 12 cases she has received cash or a promise of cash to dismiss.

50. Jones has no direct answer to the claim that she falsely certified, but she asserts that several months after certifying she could build and operate the Virginia Beach facility, she obtained a letter from Mercantile-Safe Deposit and Trust Co. of Baltimore which she believes provides reasonable assurance for the Virginia Beach facility. However, Jones never informed the Commission that she relied on the Baltimore bank. In any event, it is doubtful that that letter provides reasonable assurance. The August 10, 1988 letters to Jones from Mercantile-Safe Deposit and Trust provide assurance of loans for nearly $1.9 million which are to be personally guaranteed by Jones. When asked about her guarantee, Jones said she does not know what that provision means. If it means what it normally does, she is personally liable for repayment of the loan, there is no doubt she has insufficient assets to satisfy the debt and provide such a guarantee. Her balance sheet shows assets of about $600,000. Again Jones did not produce testimony from the bank about its intentions on a matter that Jones was not able to explain. Jones has not established that she is financially qualified.

Issue 3: The applicant who, on a comparative basis, would best serve the public interest.

Integration of management and ownership

HS

51. HS is a corporation with two stockholders, Harpal and Manmohan Chawla, who are wife and husband. Ms. Chawla owns 70 percent of the stock and proposes to work as the general manager of the station. Her spouse, Manmohan Chawla, proposes to work as the sales manager. They both have promised to work 40 hours per week. While Ms. Chawla is the corporation's president,

Mr. Chawla is the secretary and the only director. He has the sole right, as a director, to elect the corporation's officers and directors.

52. The competing applicants urge that division of ownership between the Chawlas does not reflect how HS will actually own and manage the station. Ms. Chawla testified that the split in HS' stock reflects the intended scope of her responsibilities based on Chawlas' experience producing and broadcasting a brokered one-hour long weekend radio program, "Punjabi Community Hour." The only problem with that assertion is that the Chawlas distributed the ownership and applied for this facility before the radio program existed. The Chawlas were aware that a preference is given to female applicants and, based on the facts of record, there appears to have been no other reason for the division of ownership.

53. The Chawlas, when questioned about their authority, did not claim that Ms. Chawla would have more to say than Mr. Chawla. It is their claim that they will manage the station jointly. Repeated questions to the Chawlas about how decisions would be made never elicited a response that indicated that Ms. Chawla would exert most of the authority. But even their claim that they will exercise authority jointly is in doubt on this record. The record indicates that, thus far, Mr. Chawla has taken the initiative on all matters in which a decision was required. He organized the corporation, selected counsel, the antenna site, the engineer; he obtained financing; and he, in fact, has a right to exercise more corporate authority because he is a director and Ms. Chawla is not. Ms. Chawla was not even certain about how many shares had been issued to her or when or how they were issued. She did not know who prepared the corporate documents, or who prepared the letters from the financial institutions. The elements that made up the budget for the station were supplied by Mr. Chawla. Ms. Chawla has never signed a check; she never has talked to counsel without her spouse. When she has accompanied Mr. Chawla to arrange for the site or financing, he made the arrangements and she did not take an active part. Ms. Chawla claimed that she actively assisted in preparing the EEO program but she was unable to identify one of the key organizations listed as a source for effectuating the program, American Women in Radio and Television.

54. HS has not demonstrated that Ms. Chawla will exercise any greater authority than her spouse. The pre-operational record indicates the opposite. It may be the case that Ms. Chawla performs a significant role in the preparation and broadcasting of the "Punjabi Community Hour" but the record regarding the development and pursuit of that program does not support their claim. The decisions for their brokered one hour program are made by Mr. Chawla and sometimes they will make decisions jointly. The record indicates that Mr. Chawla produces the program and that Ms. Chawla is the voice for the show. She stated that any determination she makes about subject matter is only made after consulting her spouse. In fact, it may be doubtful whether either of the Chawlas will make day-to-day decisions at the Virginia Beach facility. When Mr. Chawla was asked how they would manage since they had no management experience, he said he intended to hire a manager. This is not the only conflicting evidence about the Chawlas' intentions. Ms. Chawla's written testimony states that she will set sales policy but when asked about her role in that regard she said that Mr. Chawla would set sales policy.

55. On this record, HS has not shown that there is a likelihood that Ms. Chawla will hold 70 percent of the management authority at HS' proposed station. In its best light, it can only be concluded that the Chawlas may share authority. That, however, appears unlikely. So far, Ms. Chawla has not asserted any authority. Mr. Chawla has made all important decisions and he states that he will probably hire a professional manager to provide the knowledge necessary to run the station. HS has not provided a clear picture of how the station will be run. It is not possible to conclude that managerial authority by HS' owners will be exercised as HS claims. HS' integration proposal cannot be credited.

Brody

56. Brody is an individual applicant who proposes to work full time, 40 hours per week, as the general manager of the station. Because Brody's promise combines ownership and management, she is entitled to 100 percent comparative credit. The competing applicants argue that Brody is not entitled to any integration credit because it is not plausible that she will move from Greenville, North Carolina to Virginia Beach and operate the station. They also urge that because Brody sought advice from her father, Robert Copeland, and relied on professional legal and engineering advice to complete the application, it is improbable that she will manage the station. Brody's promise to move to Virginia Beach is not implausible. She already has a home there and she now spends at least three months of every year in the community. While it is not as clear that her spouse would move away from his family's business in Greenville, North Carolina, where Brody now spends most of the year, there is no evidence that Mr. Brody will not move or that, if he does not, that Ms. Brody will fail to manage the station. The record does not support the conclusion the competing parties urge. Brody's reliance on her father, lawyer, and engineer for advice does not show that she will not control the station. She sought their advice but there is no evidence that she did not make all decisions. There is no question that she provided the funds to pursue the proposal. Brody receives full credit for her integration promise.

Jones

57. Jones is not qualified and is not entitled to comparative consideration.

Siebert

58. Siebert is an individual applicant. He proposes to work full time, 40 hours per week, as the station's general manager. He will be responsible for all decisions. HS urges that Siebert cannot be counted on to fulfill his promise to manage the Virginia Beach station because he failed to keep a promise he made to the Commission to manage a New Orleans television station. Siebert stated at the hearing that the investors in the New Orleans facility, who apparently entered the picture after a grant of the construction permit, decided who would manage the station. He stated that he did not ask them if he could manage. Siebert said that the investors "would not have considered, even considered letting me ask the question." Tr. 659. Siebert argues in his proposed findings that he had no obligation to make good on his promise to manage the New Orleans facility because the grant of his application was made after a settlement of the case. There is nothing in the record that indicates the award resulted

from a settlement and Siebert has not provided a citation to support that claim. Siebert, moreover, has not established that the promise was withdrawn. It was incumbent on Siebert to show that he acted in good faith in the New Orleans proceeding. (Siebert's counsel was provided with an opportunity to clarify the circumstances for the record but he did not ask Siebert any questions about the New Orleans proceeding on redirect. *See* Tr. 687-90.)

59. Siebert's proposal is also questionable because he owns an accounting firm with his brother Keith in Annapolis, Maryland which he does not intend to sell. When he was first asked how the business would be run in his absence, Siebert said he would turn it over to his brother, who is a co-owner. Siebert was then asked how that would be possible since his brother has promised (and since the close of the record been awarded the frequency) to work at a station in Evergreen, Colorado. Siebert then said he would turn the firm over to an accountant who works for the firm but does not own the firm. It appeared that Siebert had not developed a plan to effectuate his integration promise but was simply making up plans as the need arose when he was questioned at the hearing. Siebert gave two different answers to questions about how much time he spends on his accounting business. At his deposition, he said it was 25 hours per week but at the hearing he said he spent 30-40 hours per week.

60. Siebert also did not report that he is president of a cellular telephone company in Missouri. When questioned about his role, he said that he was responsible for construction and operation of the system which was then beginning. Tr. 681-82. The record does not reflect how much of Siebert's time that business takes. (Siebert in his reply supplies facts which appear to answer questions about his obligation but they were not introduced at the hearing and have not been tested by the competing parties.) Siebert's written testimony is remarkable because of the material facts he withheld about his proposal to manage this facility. Siebert's promise to abandon his present accounting business is too incomplete and vague to be credited. His failure to even identify his cellular radio company and explain his role as president makes his promise to manage even less credible.

61. Two months after the record was closed Siebert petitioned to reopen the record and requested official notice about his role in his cellular company, Cell-Ventures, Ltd. The competing parties oppose his request because the facts provided are incomplete, provided after the close of the record, and are intended to change comparative facts within the control of Siebert. Siebert alleges that Cell-Ventures has requested that the Commission transfer control of Cell-Ventures, Ltd. to USCOC of Missouri RSA 1, Inc., a subsidiary of Telephone and Data Systems, Inc.

62. Siebert was obligated to develop a plan to free himself from the demands of his current jobs before he represented to the Commission that he would operate the Virginia Beach facility. The record demonstrates that he did not. And the petition to reopen the record is an attempt to now supply a credible plan where none existed previously. If the record were reopened now, the opposing parties have demonstrated that a further hearing and discovery would be required. Without a doubt, it would delay resolution of the proceeding. Such a delay is unwarranted. Siebert knew when he filed his application promising to manage the Virginia Beach station that he would have to show he could fulfill such a promise, that is, if he really ever intended to operate the facility. In any event, even if Siebert could demonstrate that his position as president of Cell-Ventures, Ltd. will no longer take any of his time, his testimony about his integration promise is not credible in too many respects to credit it. Siebert withheld key facts which when brought to his attention required that he change his testimony. Siebert's proposed change in the record about his cellular responsibilities is no more reliable than the current record facts on the matter. He has not provided a declaration with a full account of the facts. The opposing parties point out that material elements of the transaction have not been provided by Siebert and, they suggest, that the full account may have bearing on this case. There is, for example, no explanation about Siebert's role in Cell-Ventures after the transfer. The request to reopen the record and take official notice will be denied. Siebert has not provided a credible plan for managing the Virginia Beach station.

Intracoastal

63. Intracoastal is a limited partnership. The general partner, Jessie Haynes, who owns 20 percent of the equity, promises to work full time, 40 hours per week, as the general manager. There are three limited partners. Robert L. Haskins, a limited partner, owns 55 percent of the equity. It was Haskins who decided to file an application for Virginia Beach. He hired Robert Blow, a cellular radio consultant who is an experienced broadcaster, to help him select markets in which to file applications, to find a general partner and to prepare and file the application. Haskins relied on Blow to find a general partner who would be preferred in the comparative proceeding. Haynes is a female African American who has lived in the Virginia Beach area, participated in local civic activities, and has some cable programming experience. Haskins arranged for financing and selected two longtime friends to join him as limited partners. Haskins stated that he had a right to make the organizational decisions because he provided the most money. Haynes and the limited partners have only met once and Haskins claims he has not spoken with her except on that occasion.

64. While the limited partners looked at Haynes' resume, they appear to have done so after she was selected. After she became the general partner, Ms. Haynes did not perform the tasks assigned to her in the partnership agreement. For example, the agreement provides that the general partner will obtain financing. Haskins secured a loan letter from a bank he had previously dealt with and the bank did not even inquire about the general partner before it issued the loan letter. When Haskins was questioned about the inconsistency between the requirements of the partnership agreement and the failure of the general partner to perform them, he said that the financing requirement did not apply to the Intracoastal partnership. He added that there may be other terms of the partnership agreement that will not apply to Intracoastal's partnership. The partnership agreement is the same one he has used in his other broadcast partnerships.

65. Haynes did not negotiate or even discuss her 20 percent share of the equity. The shares were determined by Haskins and follow the pattern Haskins has used for his other broadcast applications. Haynes has paid the few bills the partnership has had; has attended a broadcast industry convention; has put items in the public file; and has acted as a point of contact for the partnership. But she will not decide her salary; the limited partners will

approve what she is to receive. The limited partners have also made judgments about the merits of settlement offers. She paid only $20 for her share of the equity and, although she is to receive her interest in part for her effort in pursuing the proposal, she has not done very much. Haskins concedes that in other business ventures he selected only partners that he had known for a long time and that he was familiar with. During this proceeding, Haynes declared bankruptcy. She did not tell the limited partners. Haskins thinks he heard about it from Intracoastal's counsel. At no time have the limited partners determined whether Haynes could manage a radio station or any other business.

66. Intracoastal has not demonstrated that Haynes will exercise complete authority as has been represented. She did not make decisions about the organization of the partnership or the development of the proposal. Those decisions were made by the largest equity holder and limited partner, Robert Haskins. Moreover, there is little likelihood that she will be insulated from the influence of the limited partners by the partnership agreement since Haskins has conceded that the partnership agreement has not always been followed. Intracoastal did not explain which provisions would be applicable and which would not. Intracoastal is entitled to no more than 20 percent integration credit. It is doubtful, however, that that percent represents the general partner's ability to exercise authority in the partnership since she has made no major decisions and the limited partners, who hold 80 percent of the equity, are longtime associates and believe they have a right to participate in decisions about the partnership.

Qualitative enhancements

67. Only Brody is entitled to 100 percent integration credit and, therefore, a qualitative comparison is unnecessary.

Auxiliary power

68. All the applicants have proposed auxiliary power.

Comparative coverage

69. All the qualified applicants are very slightly preferred over Siebert for their greater overall coverage. No other coverage preference is warranted.

Diversification of ownership of the mass media

70. None of the applicants have cognizable mass media interests.

Other Matters

71. HS requests that the record be reopened to explore whether Jessie Haynes would return to Virginia Beach now that she has moved from Pennsylvania to Texas. HS has not shown that Haynes' promise is suspect because of the move. The request will be denied.

Summary

72. Among the qualified applicants, Brody's proposal would best serve the public interest because she will combine 100 percent integration of management and ownership; no other qualified applicant has equal comparative strength.

ACCORDINGLY, IT IS ORDERED that the petition for leave to amend and amendment, filed October 9, 1991 by Intracoastal Airwaves Limited Partnership IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the motion to reopen the record and request for official notice, filed August 5, 1991 by Craig L. Siebert IS DENIED.

IT IS FURTHER ORDERED that the motion to reopen the record, authorize discovery and set further hearing dates, filed October 11, 1991 by HS Communications, Inc. IS DENIED.

IT IS FURTHER ORDERED that the applications of HS Communications, Inc. (File No. BPH-880505MZ), Pamela R. Jones (File No. BPH-880505NR), Craig L. Siebert (File No. BPH-880505PM), Intracoastal Airwaves Limited Partnership (File No. BPH-880505PN) ARE DENIED and the application of Stacy C. Brody (File No. BPH-880505NO) for a construction permit for a new commercial FM station on Channel 271 C2 at Virginia Beach, Virginia IS GRANTED.[1]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Sec. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-352

In re Applications of

WCVQ, Inc.	File No. BPCT-871224KG
NICHOLS BROADCASTING CORPORATION	File No. BPCT-880301KF
MAPLE LEAF BROADCASTING LIMITED PARTNERSHIP	File No. BPCT-880301KG
LAKE CHAMPLAIN COMMUNICATIONS, INC.	File No. BPCT-880301KH
BURLINGTON CHANNEL 44, INC.	File No. BPCT-880301KI
BURLINGTON 44 COMPANY	File No. BPCT-880301KL
DAVID McMEEKIN	File No. BPCT-880301KM

For Construction Permit for New Television Station, Channel 44, Burlington, Vermont

ORDER

Adopted: January 31, 1992; Released: February 13, 1992

By the Review Board: BLUMENTHAL, ESBENSEN, and GREENE.

1. The *Initial Decision* of Administrative Law Judge Eward Luton, 4 FCC 8554 (ALJ 1989), denied the application of Maple Leaf Broadcasting Limited Partnership. That applicant has not timely filed exceptions with the Board.

2. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 CFR § 1.276(f), the application of Maple Leaf Broadcasting Limited Partnership (File No. BPCT-880301KG) IS DISMISSED with prejudice for failure to prosecute.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-402

In the Matter of

Amendment of Section 73.202(b),	RM-6903
Table of Allotments,	RM-7012
FM Broadcast Stations.	
(Virginia City, Nevada,	
and South Lake Tahoe,	
Sutter Creek, and Quincy,	
California)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 27, 1992; Released: February 11, 1992

By the Assistant Chief, Allocations Branch:

1. At the request of Denise Neubauer ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 6896 (1989), proposing the allotment of Channel 273C3 to Virginia City, Nevada, as the community's first local FM service. Petitioner filed comments reiterating her intention to apply for the channel, if allotted. Emerald Broadcasting Company ("Emerald"), licensee of Station KZFF (formerly KTHO-FM), South Lake Tahoe, California, filed comments and a counterproposal requesting the substitution of Channel 275C for Channel 275C2 and the modification of Station KZFF's license to specify operation on the higher class channel.[2] To accommodate the South Lake Tahoe allotment, Emerald also requests the substitution of Channel 240A for Channel 276A at Quincy, California, and the modification of Station KNLF's construction permit to specify the alternate Class A channel, and the substitution of Channel 298A for then unoccupied but applied for Channel 269A at Sutter Creek, California.[3] [4] Reply comments were filed by Hillcrest Motor Company ("Hillcrest"), licensee of Station KXOA, Channel 300B, Sacramento, California, and Affinity Communications, Inc. ("Affinity"), licensee of Station KTMX(FM), Colusa, California.[5] These proposals are mutually exclusive because South Lake Tahoe and Virginia City are located approximately 46 kilometers apart while the Commission's Rules stipulate a minimum distance separation of 105 kilometers for second adjacent Class C2 and Class C stations.[6]

2. Emerald recognizes that Channel 273C2 would represent Virginia City's first local FM allotment. However, it argues that (1) Virginia City is not a community for allotment purposes and (2) that the allotment violates Section 73.315(a) of the Commission's Rules because the station could not provide Virginia City with the required 70 dBu city-grade signal coverage. Emerald describes Virginia City as an unincorporated locale which is not listed in the U.S. Census. It states that Virginia City is an historic preservation district whose only industry is tourism and that it has no local government, hospitals, libraries or businesses, with the exception of a bank open only three days per week, aimed at serving a permanent population. Rather, it contends that the retail outlets, saloons, casinos and hotels that do exist, do so only to serve tourists and not community needs attributable to a "'recognizable group with common interests.'"

3. However, even if the Commission were to grant Virginia City community status, Emerald argues that the allotment cannot be made in compliance with the Commission's technical requirements. It notes that the allotment of Channel 273C3 at Virginia City requires a site restriction of 19.9 kilometers (12.4 miles) northeast of the community. Further, the terrain between Virginia City and the theoretical transmitter site area is mountainous, thus causing line-of-sight problems which would prevent a station from providing Virginia City with a 70 dBu city-grade signal. Additionally, Emerald submits that these problems would be encountered from any site within the available transmitter site area. Therefore, Emerald submits that the allotment of Channel 273C2 to Virginia City would contravene the Commission's policy of allotting a channel only where compliance with city-grade coverage requirements can be shown and not entertaining requests to waive the city-grade coverage requirements at the allotment stage, citing *Wadley and Dadeville, Alabama*, 60 RR 2d 1462 (1986) and *Greenwood, South Carolina, et al.*, 63 RR 2d 251 (1987).

4. Emerald, on the other hand, urges the allotment of Channel 275C to South Lake Tahoe. In support, it states that Station KZFF presently provides service to 127,491 persons but that the station could provide service to an additional 271,313 persons if it operated on Channel 275C in lieu of its present Channel 275C2. Additionally, it states that an upgraded Station KZFF will provide a first aural service to 4,352 persons within a 468 square kilometer (181 square mile) area and a third service to 1,134 persons within a 246 square kilometer (95 square

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[1] The communities of South Lake Tahoe, Sutter Creek and Quincy, California, have been added to the caption.

[2] An application to assign Station KZFF's license from Emerald Broadcasting Company to Tri-Valley Broadcasting, Inc. (BALH-910925GO), is pending before the Commission.

[3] Public Notice of the counterproposal was given on December 20, 1989, Report No. 1804.

[4] On January 23, 1991, a construction permit was granted to Susan E. Turgetto for Station KMAT.

[5] After the record closed, Valley Broadcasters, Inc. ("Valley"), licensee of Station KSTN-FM, Channel 297B, Stockton, California, filed reply comments and Emerald filed a response to all the reply comments, accompanied by a motion for their acceptance. Section 1.420(d) of the Commission's Rules does not contemplate the filing of comments beyond the pleading cycle. Therefore, these untimely filed pleadings will not be considered herein.

[6] Emerald's counterproposal was filed on November 13, 1989. However, Emerald had originally filed an identical proposal in a petition for rule making on August 7, 1989, and incorporated by reference in its counterproposal. Had the staff been aware of the existence of the August 7 petition prior to adoption of the *Notice* on August 24, 1989, Emerald's original request would have been made a part of the *Notice*. Therefore, the mileage separation requirements used herein are those in effect prior to October 2, 1989.

mile) area. Emerald also states that the required channel changes at Quincy and Sutter Creek present no impediment to the allotment of Channel 275C at South Lake Tahoe. It states that Channel 240A can be allotted to Quincy in compliance with the Commission's minimum distance separation requirements and provides a copy of the agreement between it and New Life Broadcasting, permittee of Station KNLF, in which New Life Broadcasting consents to the frequency change. As to the substitution of Channel 298A for Channel 269A at Sutter Creek, Emerald notes that the Commission has already proposed the substitution of Channel 276A in lieu of Channel 269A to accommodate the allotment of Channel 270B1 at Shingle Springs, California, in MM Docket No. 89-62. *See* 4 FCC Rcd 2297 (1989), *recon. den.*, 7 FCC Rcd _____ (adopted January 24, 1992). However, it states that Channel 298A can be substituted instead, which, unlike Channel 276A, does not require the imposition of a site restriction.[7]

5. Hillcrest argues that statements made by Emerald in its November 3, 1989, Comments and Counterproposal are contradicted by the affidavit of Oliver W. Hayden, Vice President and General Manager of then Station KTHO-FM appended to Emerald's August 7, 1989, petition for rule making. In its November 3 pleading, Emerald argues that Virginia City is, at best, a "quiet village" and, at worst, not a community for allotment purposes. However, Hayden's affidavit states that Virginia City, with a population of 700-1000 persons, is the seat of Storry County. In addition, Virginia City is credited with having 100 retail outlets, 3 schools, 3 churches, a city park and a volunteer fire department.[8] Therefore, Hillcrest contends that Virginia City is a community for allotment purposes.

6. Hillcrest agrees that terrain factors would not permit the Virginia "City station to provide the entire community with city-grade service. However, Hillcrest argues that the proposed allotment at Virginia City represents a unique situation and thus should not be disqualified solely because of this problem. First, Hillcrest contends that Channel 273C3 may be the last FM channel available which could provide Virginia City with its own local transmission service. Second, it states that the failure to provide city-grade coverage is not due to the need for a severe site restriction, as is typically the case according to Hillcrest, but the terrain characteristics which would prevent such service even if the transmitter could be located as close as 3 kilometers from the community. Therefore, Hillcrest believes that an accommodation should be made to ensure that Virginia City receives its first, and possibly only, aural transmission service. This accommodation, according to Hillcrest, could be a condition on the allotment requiring that applicants for the channel demonstrate compliance with the city-grade coverage requirements by use of an on-channel booster transmitter in or adjacent to the community. It contends that use of the on-channel booster would ensure that all of Virginia City receives the required 70 dBu city-grade signal. In support, it cites *WSTE-TV, Inc.*, 75 FCC 2d 52 (1979), where the Commission permitted a television permittee to relocate its transmitter site and use a translator to provide the required city-grade service. Hillcrest argues that the facts are almost identical here because terrain characteristics will prevent a station on virtually any channel from providing the required signal to Virginia City. Finally, Hillcrest states that it will apply for Channel 273C3, if allotted to Virginia City, and that its application will include a request for a booster station in order to provide the entire community with the requisite city-grade signal.

7. Finally, Hillcrest disputes Emerald's claim that Channel 275C at South Lake Tahoe would provide service to any unserved or underserved areas. It claims that the intervening terrain will prevent line-of-sight service to most of the "white" area claimed by Emerald and that the small area not so affected is unpopulated.

DISCUSSION

8. Based upon a careful review of the pleadings before us, we find that a comparison of the two proposals is not necessary because the Virginia City proposal does not comply with the Commission's technical requirements. While the allotment of Channel 273C3 to Virginia City could provide the community[9] with its first local FM transmission service, the staff has confirmed that a station transmitting from the proposed reference coordinates cannot comply with the 70 dBu city-grade coverage requirements set forth in Section 73.315(a) of the Commission's Rules due to the intervening mountainous terrain. In fact, it appears that there is no theoretical transmitter site which would comply with the minimum distance separation requirements and also permit compliance with Section 73.315(a). As Hillcrest is aware, Commission practice is generally to deny allotment requests where the principal city coverage requirements of Section 73.315(a) cannot be met. *See Greenwood, South Carolina, et al*, 2 FCC Rcd 3583 (1987), *app. for rev. denied*, 3 FCC Rcd 4108 (1988), and cases cited therein. We find that Hillcrest has not provided a sufficiently compelling reason why we should depart from this policy. While it may be true that Channel 272C3 could be the last channel available for allotment to Virginia City, that no other channel could be allotted which would not suffer from the same infirmities,

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[7] Both Affinity and Hillcrest object to the allotment of Channel 298A to Sutter Creek. Hillcrest opposes the Sutter Creek allotment because it will be precluded from relocating Station KXOA's transmitter to an antenna farm. Affinity opposes the allotment because it would result in a "grandfathered" short-spacing to Station KTMX(FM). These objections have already been considered and rejected in response to the petitions for reconsideration which both parties filed pursuant to the *Report and Order* in MM Docket 89-62, which allotted Channel 298A to Sutter Creek. *See* 4 FCC Rcd 8482 (1989), *recon. den.*, 7 FCC Rcd _____ (adopted January 24, 1992). Therefore, Affinity's reply comments, which are solely directed to the allotment of Channel 298A at Sutter Creek, and that portion of Hillcrest's reply comments which pertain to the Sutter Creek allotment are moot and will not be discussed.

[8] *See* Emerald's Comments and Counterproposal filed November 13, 1989, and Appendix 3 to Emerald's August 7, 1989, Petition for Rule Making.

[9] Although the technical impediments to the allotment of Channel 273C3 negate the need to address the community issue raised by Emerald, we believe that the evidence presented sufficiently demonstrates that Virginia City is a community for allotment purposes. Virginia City, with a permanent population of 700-1000 persons, has its own schools, churches, fire department, city park, senior center, Chamber of Commerce, and businesses. *See, e.g., Evans, Martinez and Warrenton, Georgia*, 4 FCC Rcd 7926 (1989), and *Gleneden Beach, Oregon*, 3 FCC Rcd 6464 (1988).

and Virginia City, as a county seat and tourist mecca, deserves its first local FM service, we find these arguments to be unpersuasive. The provision of a first local FM service is a desirable goal and a high priority in the allotment of channels. However, it is not of sufficient weight to warrant the allotment of a substandard channel. As recently stated in *Sonora, California* "... the Commission has an overriding concern with establishing FM allotments on which technically viable stations can operate. Accordingly, we require strict adherence to our technical rules at the allotment stage." *See* 6 FCC Rcd 6042 (1991), *recon. pend.*

9. Finally, although Hillcrest proposes to ensure city-grade coverage by the use of a booster transmitter, such boosters (or on-channel translators) are secondary services which cannot be used to ensure compliance with the signal coverage requirements of the Commission's Rules. Hillcrest cites *WSTE-TV, Inc., supra,* as support for its position. However, we find that *WSTE-TV, Inc.* is not analogous to the situation here. In this proceeding, Hillcrest is seeking the allotment of a channel which it acknowledges fails to comply with the technical requirements set forth in the Commission's Rules. *WSTE-TV, Inc.,* on the other hand, concerns the denial of an application filed by the Fajardo, Puerto Rico, television station seeking to relocate its transmitter. Additionally, in reviewing the decision allotting the channel to Fajardo, it appears that no terrain problems were raised at the allotment stage. *See Aguadilla, Arecibo and Fajardo, Puerto Rico - Charlotte Amalie, Virgin Islands,* 16 RR 1544 (1957).

10. Accordingly, we believe that the public interest would be served by substituting Channel 275C for Channel 275C2 at South Lake Tahoe, California, since it could provide the community with an expanded radio service and enable Station KZFF to provide service to an additional 271,313 persons. As requested, we will also modify petitioner's license for Station KZFF to specify operation on the higher class channel and the construction permit of Station KNLF, Quincy, California, to specify Channel 240A in lieu of its present Channel 276A. It is not necessary to issue an *Order to Show Cause* to New Life Broadcasting, permittee of Station KNLF, because Emerald has furnished a signed copy of New Life Broadcasting's agreement to the change in channel. No change in the Sutter Creek allotment need be made here as Channel 298A was allotted to Sutter Creek in MM Docket 89-62. *See* fn. 5, *supra.*

11. Channel 275C can be allotted to South Lake Tahoe in compliance with the Commission's minimum distance separation requirements with a site restriction of 24.9 kilometers (15.5 miles) north to accommodate Emerald's desired transmitter site. Channel 240A can be allotted to Quincy, California, and can be used at the site specified in Station KNLF's outstanding construction permit.[10]

12. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 27, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
South Lake Tahoe, California	230B1, 275C
Quincy, California	240A, 262A, 271C2

13. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Emerald Broadcasting Company for Station KZFF, South Lake Tahoe, California, IS MODIFIED to specify operation on Channel 275C, in lieu of Channel 275C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

14. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of New Life Broadcasting for Station KNLF, Quincy, California, IS MODIFIED to specify operation on Channel 240A in lieu of Channel 276A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KNLF's permit, BPH-861020TC, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with permit BPH-861020TC, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

15. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the permittee, as follows: New Life Broadcasting, Station KNLF, Box 117, 440 Lawrence, Quincy, California 95971.

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

[10] The coordinates for Channel 275C at South Lake Tahoe, California, are North Latitude 39-09-15 and West Longitude 119-52-55. The coordinates for Channel 240A at Quincy, California, are 39-58-03 and 120-53-34.

17. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-19

In the Matter of

Amendment of Section 73.202(b), RM-7882
Table of Allotments,
FM Broadcast Stations.
(Memphis, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 31, 1992; Released: February 11, 1992

Comment Date: April 3, 1992
Reply Comment Date: April 20, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Boyer Broadcasting Company, Inc., ("petitioner"), proposing the substitution of Channel 263C3 for Channel 263A at Memphis, Missouri, and the modification of its license for Station KMEM(FM) to operate on the higher powered channel.[1] Petitioner failed to state its intention to apply for the channel, if allotted, and must do so in comments responsive to this *Notice*.

2. We believe the public interest would be served by proposing the substitution of Channel 263C3 for Channel 263A at Memphis, Missouri, since it would provide the community with a wide coverage area FM service. Channel 263C3 can be allotted to Memphis in compliance with the Commission's minimum distance separation requirements at the petitioner's present transmitter site without the imposition of a site restriction.[2] As requested, we also propose to modify petitioner's license for Station KMEM(FM) to specify operation on Channel 263C3 at Memphis. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 263C3 at Memphis or require the petitioner to demonstrate the availability of an additional equivalent class channel.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
Memphis, Missouri	263A	263C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 3, 1992,** and reply comments on or before **April 20, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Eugene T. Smith, Esq.
715 G Street, S.E.
Washington, D.C. 20003
(Counsel for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

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[1] Petitioner has been ordered to amend its license to specify operation on Channel 263A in lieu of Channel 244A. *See Report and Order* (MM Docket No. 90-284), 6 FCC Rcd _____ (released December 19, 1991). This petition was originally filed as an untimely counterproposal in MM Docket No. 90-284. Based on the actions taken in that proceeding, we will propose the substitution of Channel 263C3 for Channel 263A at Memphis and the modification of its construction permit for Station KMEM(FM) accordingly.

[2] The coordinates for Channel 263C3 at Memphis are North Latitude 40-29-59 and West Longitude 92-09-58.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-132

In the Matter of

Amendment of Section 73.202(b),	RM-7692
Table of Allotments,	RM-7764
FM Broadcast Stations.	
(Birnamwood and Neenah-Menasha,[1]	
Wisconsin)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 3, 1992; Released: February 11, 1992

By the Assistant Chief, Allocations Branch:

1. In response to a petition filed by Fox Valley Broadcasting, Inc. ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 2473 (1991), seeking the substitution of FM Channel 232C3 for Channel 232A at Neenah-Menasha, Wisconsin. Petitioner also requests modification of its license for Station WROE, to specify operation on Channel 232C3. In response to the *Notice*, Birnamwood Broadcasting Company ("Birnamwood Broadcasting") filed a counterproposal.[2] Petitioner filed comments supporting the allotment of Channel 232C3 at Neenah-Menasha. Petitioner also filed reply comments.

2. Birnamwood Broadcasting's counterproposal requests the allotment of Channel 232A to Birnamwood, Wisconsin, to provide the community with its first local service. Birnamwood Broadcasting stated its intention to file an application for Channel 232A at Birnamwood.

3. In reply comments, petitioner continues to support the substitution at Neenah-Menasha. In response to the counterproposal filed by Birnamwood Broadcasting, petitioner suggests the allotment of an alternate channel to Birnamwood instead of Channel 232A. Petitioner notes that such action would provide the greatest possible amount of new FM service, giving Birnamwood its first FM allotment while providing expanded service in the Neenah-Menasha area.

4. After consideration of the information filed in this proceeding, we believe the public interest would be served by the substitution of Channel 232C3 for Channel 232A at Neenah-Menasha in compliance with the Commission's spacing requirements at petitioner's specified site 16.5 kilometers (10.2 miles) northwest of the community.[3] In accordance with Section 1.420(g) of the Rules, we shall modify the license of Station WROE to specify operation on Channel 232C3 in lieu of Channel 232A. In response to the counterproposasl, we believe it would be in the public interest to allot a channel to Birnamwood. A staff analysis has determined that Channel 225A can be allotted to Birnamwood, Wisconsin, in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules provided there is a site restriction 7.6 kilometers (4.7 miles) northwest of the community.[4] The site restriction will prevent a short spacing to Station WDUX-FM, Channel 224A, Waupaca, Wisconsin. Although there is a short spacing to Station WJJQ-FM, Channel 224A, Tomahawk, Wisconsin, the license for Station WJJQ-FM was modified to specify operation on Channel 223C3 in MM Docket No. 90-393.[5] *See* 5 FCC Rcd 7387 (1990). Therefore, the grant of a license for Channel 225A, Birnamwood, may be withheld until Station WJJQ-FM is licensed on Channel 223C3.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 27, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Birnamwood, Wisconsin	225A
Neenah-Menasha, Wisconsin	232C3, 262A

6. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WROE, Neenah-Menasha, Wisconsin, IS MODIFIED to specify operation on Channel 232C3 in lieu of Channel 232A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to

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[1] The community of Birnamwood has been added to the caption.

[2] Public notice of the counterproposal was given on July 19, 1991, Report No. 1853 (RM-7764).

[3] The coordinates for Channel 232C3 at Neenah-Menasha are 44-19-00 and 88-33-00.

[4] The coordinates for Channel 225A at Birnamwood are 44-59-11 and 89-15-30.

[5] The construction permit for Station WJJQ-FM, Channel 223C3 (BPH-910221IE) was granted on August 29, 1991.

implement the change in community of license and/or upgrade. As a result of this proceeding, Fox Valley Broadcasting, Inc., licensee of Station WROE, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

8. The window period for filing applications for Channel 225A at Birnamwood will open on **March 30, 1992,** and close on **April 29, 1992.**

9. IT IS FURTHER ORDERED, That the Secretary of the Commission Shall Send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Gregory Albert & Margaruite S. Albert
Station WDUX-FM
P.O. Box 10
Tomahawk, Wisconsin 54487

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-20

In the Matter of

Amendment of Section 73.202(b), RM-7645
Table of Allotments,
FM Broadcast Stations.
(Shingle Springs and Quincy,
California)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 3, 1992; Released: February 11, 1992

Comment Date: April 3, 1992
Reply Comment Date: April 20, 1992

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Lobster Communications Corporation ("petitioner" or "Lobster"), licensee of Station KLIQ(FM), Channel 270B1, Shingle Springs, California, requesting the substitution of Channel 270B for Channel 270B1 at Shingle Springs and modification of its license for Station KLIQ(FM) to specify operation on the higher powered channel. In order to accommodate its request in conformity with the minimum distance separation requirements of the Commission's Rules, petitioner also seeks the substitution of Channel 271A for Channel 271C2 at Quincy, California,[1] and modification of the license issued to Olympic Broadcasters, Inc. ("Olympic"), for Station KQNC(FM) accordingly.

2. In support of the proposal, petitioner states that the requested substitution at Shingle Springs would enable Station KLIQ(FM) to provide enhanced service within its coverage area. Petitioner's proposal includes a statement from Jamie Clark, a vice president of both Lobster and Olympic, asserting that Olympic agrees to the downgrade proposal for Station KQNC(FM). Additionally, Olympic's supporting statement asserts that the Quincy substitution would result in "parity" among the FM broadcasters in that community.

3. A staff engineering analysis reveals that Channel 270B can be substituted for Channel 270B1 at Shingle Springs at the petitioner's suggested site, located 25.3 kilometers (15.7 miles) north of the community.[2] Channel 271A can be substituted for Channel 271C2 at Quincy at the site specified in the construction permit issued to Station KQNC(FM).[3]

4. Since the petitioner's modification request conforms with the provisions of Section 1.420(g) of the Commission's Rules, we shall propose to modify the facilities of Station KLIQ(FM) at Shingle Springs and Station KQNC(FM) at Quincy, without entertaining other expressions of interest.

5. Although an *Order to Show Cause* to Station KQNC(FM) at Quincy is not required in view of its consent to the petitioner's modification request, we will serve it with a copy of this *Notice*.

6. In view of the above, we consider it appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with regard to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Shingle Springs, California	270B1	270B
Quincy, California	262A, 271C2, 276A	262A, 271A, 276A

7. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by Certified Mail, Return Receipt Requested, to Olympic Broadcasters, Inc., 5705 Marconi Avenue, Carmichael, California 95608.

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particu-

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[1] The distance between the Shingle Springs proposal and Station KQNC(FM) at Quincy is 129.7 kilometers, whereas the required distance is 241 kilometers. If Channel 271A is substituted for Channel 271C2 at Quincy, the required minimum distance separation would be reduced to 113 kilometers.

[2] Coordinates at the petitioner's suggested site at Shingle Springs are 38-53-31 and 120-57-53. Petitioner acknowledges that use of its specified site is short-spaced to the counterproposal of Modern Broadcasting Corporation ("Modern") in MM Docket No. 89-288, to substitute Channel 269C2 for Channel 269A at Reno, Nevada, for the use of Station KTHX(FM) (formerly Station KSXY(FM)). However, petitioner advises that on November 30, 1990, it acquired Station KTHX(FM) from Modern (File No. BALH-900824EF), and concurrent with the filing of the instant proposal, it requested dismissal of its counterproposal at Reno. This proposal has been dismissed. *See Report and Order* in MM Docket No. 89-288, adopted February 3, 1992. We note that an assignment of the license for Station KTHX(FM) from Lobster to Olympic (File No. BALH-910130GX) was subsequently granted April 4, 1991 and consummated April 9, 1991.

[3] Coordinates at the site specified in the construction permit issued to Station KQNC(FM) at Quincy are 40-03-36 and 120-54-46.

The mutual exclusivity between Shingle Springs and Quincy would not have occurred if Olympic had applied to modify its construction permit to specify Channel 271A prior to the filing of the instant proposal. However, since the Quincy downgrading is necessary to meet the minimum distance spacing requirements to Shingle Springs, we believe it is a more efficient use of the Commission's resources to seek the reclassification of Station KQNC(FM) at Quincy in the context of this proceeding, solely to accommodate the Shingle Springs modification request.

lar, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **April 3, 1992,** and reply comments on or before **April 20, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Richard A. Helmick, Esq.
Cohn and Marks
1333 New Hampshire Ave., N.W.
Suite 600
Washington, D.C. 20036

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-128

In the Matter of

Amendment of Section 73.202(b), RM-7694
Table of Allotments,
FM Broadcast Stations.
(Holbrook, Arizona)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 3, 1992; Released: February 11, 1992

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 6 FCC Rcd 2454 (1991), issued in response to a petition filed on behalf of Navajo Broadcasting Company, Incorporated ("petitioner"), permittee of Station KZUA(FM), Channel 221A, Holbrook, Arizona, proposing the substitution of Channel 221C1 for Channel 221A and modification of its permit to specify operation on the higher powered channel. Petitioner filed supporting comments in response to the *Notice*. Michael T. McKenna ("McKenna") filed comments and an unacceptable counterproposal.[1] Petitioner and Tusayan Broadcasting Company, Inc. ("TBC"), permittee of Station KSGC(FM), Channel 221A, Tusayan, Arizona, each filed reply comments.[2]

2. While petitioner's initial comments reiterate its intention to apply for Channel 221C1, its responsive comments state a willingness to accept lower class Channel 221C2 to accommodate the Grand Canyon Village counterproposal, in order to expedite the resolution of this proceeding. However, since we have rejected McKenna's request (*see* note 1, *supra*), and Channel 221C1 is technically acceptable, we need not consider petitioner's proposed solution. We believe the public interest would be better served by allotting the higher class channel to Holbrook, consistent with the petitioner's original allotment request. We also believe that our determination may be more conducive to fulfilling the petitioner's desire to provide an improved service to Holbrook, and that petitioner would not have agreed to seek the lower class channel in the absence of McKenna's request.[3]

3. As indicated in the *Notice*, Channel 221C1 can be allotted to Holbrook consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules without the imposition of a site restriction. [4] Additionally, as previously stated in the *Notice*, there will be no overlap of the proposed 1 mV/m contour of Station KZUA(FM) at Holbrook with the Grade B contour of any Channel 6 television station.

4. In view of the above, we believe the public interest would be served by substituting Channel 221C1 for Channel 221A at Holbrook, Arizona, since it would provide an expanded coverage area FM service to the community. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the construction permit of Station KZUA(FM) to specify operation on Channel 221C1 in lieu of Channel 221A, as requested.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 27, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Holbrook, Arizona	221C1

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Navajo Broadcasting

[1] McKenna requests the allotment of Channel 221C2 to Grand Canyon Village, Arizona, as a first local aural transmission service. McKenna also requests the substitution of Channel 221C2 in lieu of proposed Channel 221C1 at Holbrook, as well as the substitution of Channel 232A for Channel 221A at Tusayan, Arizona, and modification of the construction permit for Station KSGC(FM), Tusayan, to accommodate his proposal. McKenna's proposal is technically and procedurally defective and was not placed on public notice.

Although McKenna signed the counterproposal and provided an address, he failed to include an affidavit verifying that the statements contained in his comments were accurate to the best of his knowledge. Section 1.52 of the Commission's Rules requires that the original of any documents filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, a pleading may be returned as unacceptable. *See Monroeville, AL*, 5 FCC Rcd 7027 (1990). Section 1.402(b) of the Rules concerning rule making proceedings puts petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification.

[2] TBC claims that although McKenna's comments contain a certificate of service indicating compliance with the service requirements on the affected parties, the counterproposal was not served on TBC. Rather, TBC advises that it was apprised of the filing in an informal discussion with the Commission's staff. Therefore, TBC opposes any consideration of McKenna's proposal since, if adopted, it would impinge upon TBC's modification plans for Station KSGC(FM) at Tusayan. TBC's opposition is moot in light of our rejection of McKenna's counterproposal. However, we note that McKenna did not respond to TBC's allegation.

[3] However, in the event petitioner determines that a lower class channel would accomplish its modification goal at Holbrook, it may seek to downgrade Channel 221 in connection with its application to be filed for the facility. *See* § 73.3573(a)(1) of the Commission's Rules.

[4] Coordinates used for Channel 221C1 at Holbrook are 34-54-12 and 110-09-48.

Company, Incorporated (BPH-890118MF), for Station KZUA(FM), IS MODIFIED to specify operation on Channel 221C1 in lieu of Channel 221A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Navajo Broadcasting Company, Incorporated, permittee of Station KZUA(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-288

In the Matter of

Amendment of Section 73.202(b),	RM-6608
Table of Allotments,	RM-7005
FM Broadcast Stations.	RM-7006
(South Lake Tahoe, California;	
Reno and Minden, Nevada)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 3, 1992; Released: February 11, 1992

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making* ("Notice"), 4 FCC Rcd 5013 (1989), which was issued in response to a petition for rule making filed by Daniel S. Tankersley ("Tankersley"). The *Notice* proposed the allotment of Channel 268A at South Lake Tahoe, California, as that community's third local FM service. Kidd Communications ("Kidd") submitted a counterproposal requesting that Channel 268A be allotted to Minden, Nevada. Modern Broadcasting Company ("Modern"), licensee of Station KSXY(FM), Channel 269A, Reno, Nevada, filed a counterproposal requesting that, in lieu of allotting Channel 268A to South Lake Tahoe, the Commission substitute Channel 269C2 for Channel 269A at Reno and modify its license to specify operation on the upgraded channel.[2] Modern filed reply comments in response to the *Notice*, and both Modern and Kidd filed reply comments in response to the Public Notice accepting their counterproposals. After the pleading cycle ended, Ski James Broman filed a motion to accept and comments, and Modern filed an opposition and motion to strike.

2. *South Lake Tahoe.* As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted. It is the Commission's policy to refrain from making an allotment to a community absent an expression of interest. Therefore, since no expression of interest in the allotment of Channel 268A at South Lake Tahoe was filed by Tankersley or any other party, we shall dismiss Tankersley's proposal to allot Channel 268A to South Lake Tahoe, California. *See, e.g., Joshua Tree, CA*, 54 FR 18557, May 1, 1989, *Senatobia, MS*, 3 FCC Rcd 4000 (1988), and paragraph 2 of the Appendix to the *Notice*.

3. *Reno Counterproposal.* After the pleading cycle ended in this proceeding, Lobster Communications Corporation ("Lobster") acquired Station KSXY(FM), Reno, Nevada, from Modern and filed a request to dismiss the counterproposal to substitute Channel 269C2 for Channel 269A at Reno and to modify Station KSXY(FM)'s license accordingly. Lobster stated that it is not interested in upgrading Station KSXY(FM) to a Class C2 channel but instead will seek to increase the station's power from 3kW to 6kW. We will grant Lobster's request to dismiss the counterproposal.[3]

4. *Minden Counterproposal.* Likewise, after the pleading cycle ended, Kidd filed a request to dismiss his counterproposal to allot Channel 268A to Minden, stating that he no longer had an interest in pursuing an FM channel at Minden. We will grant Kidd's request to dismiss his counterproposal.

5. We also have before us a motion to accept and comments filed by Broman containing his expression of interest in applying for the allotment of Channel 268A at Minden. Broman concedes that his expression of interest was filed on December 18, 1989, more than four months after the August 11, 1989 date established in the *Notice* as the cut-off date for initial comments, and more than two months after the fifteen-day deadline, expiring October 6, 1989, for responding to the September 20, 1989 Public Notice accepting Kidd's counterproposal. However, Broman explains his tardiness by stating that he could not reasonably have foreseen that Kidd would withdraw his counterproposal and therefore did not think it necessary to file an expression of interest in view of its clear merit under Section 307(b) of the Communications Act. He contends that, in allotment proceedings, the Commission should impose on allotment proponents a duty of disclosing withdrawals similar to the duty imposed in application proceedings by Section 73.3525 of our Rules when Section 307(b) considerations are involved. He also argues that the Commission may consider expressions of interest in a timely filed counterproposal at anyime prior to its action on the counterproposal.

6. In its opposition and motion to strike Broman's pleading, Modern contends that Broman's request for late acceptance of his expression of interest should be denied. In support of this position, Modern notes that Section 1.415 of the Rules provides that comments in rulemaking proceedings ordinarily may not be filed after the deadline specified, while Section 1.46 provides that such deadlines may be extended only upon a showing that an emergency situation prevented the filing of timely comments. Modern argues that Broman has advanced no sound justification for waiving these requirements. Although Broman suggests that the public interest would be served by consideration of the Minden proposal, Modern contends that the orderly and expeditious conduct of the Commission's business constitutes an overriding public interest which requires that untimely submissions will not be considered where no compelling circumstances exist and no good cause for untimeliness has been demonstrated. Modern concludes that inaction of the kind demonstrated by

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[1] The communities of Reno and Minden, Nevada, have been added to the caption.

[2] Public notice of the counterproposals filed by Kidd and Modern was given on September 20, 1989, Report No. 17969.

[3] Since Lobster's request for withdrawal of the counterproposal occurred after the effective date of the Commission's abuse rules, it submitted an affidavit pursuant to Section 1.420(j) stating that it received no consideration in exchange for withdrawal of its counterproposal.

Broman does not constitute a compelling circumstance. On the contrary, Modern contends that acceptance of such a late-filed expression of interest would have a disruptive effect on the Commission's processes because it would effectively render deadlines meaningless and obviate the Commission's ability to conduct rulemakings in an orderly, expeditious, and fair manner.

7. After careful consideration of the record in this proceeding, we believe that the public interest is best served by dismissal of Broman's expression of interest in Channel 268A at Minden because it is late filed. As the Commission stated in *Moscow, Ohio*, 5 FCC Rcd 927 (1990) and reiterated recently in *Marine Broadcasting Corporation*, FCC 92-4, released January 15, 1992, "Acceptance of late-filed comments supporting an allotment proposal is limited to situations where there is no opposition to the proposal and where there would be no adverse impact on another pending proposal." In the present situation, as in *Marine*, acceptance of Broman's late filed expression of interest would have created prejudice at the time it was filed because his expression of interest in the allotment of Channel 268A at Minden was mutually exclusive with Modern's pending proposal to upgrade its Reno station from Channel 269A to Channel 269C2. Accordingly, Broman's late-filed expression of interest may not be considered in this proceeding.[4]

8. Even if Broman's expression of interest had been timely filed, we would still dismiss it because there is an insufficient basis in the record for determining whether Minden, Nevada, is a community for allotment purposes under Section 307(b) of the Communications Act. Generally, we presume community status if a community is listed in the U.S. Census or incorporated. However, Minden is neither separately listed in the U.S. Census or incorporated.[5] Under these circumstances, we would need additional information to demonstrate that Minden has the social, economic, cultural, or governmental indicia to qualify it as a community for allotment purposes. However, no such information is in the record of this proceeding. On the contrary, Modern has stated that Minden has no local government, relies on outside agencies for police protection, and shares a weekly newspaper and chamber of commerce with other towns. Modern further states that Minden's business establishments consist only of a strip of motels, gas stations, fast food outlets, and similar enterprises. Moreover, there is no evidence in this record that those businesses have a nexus with Minden. *See, e.g., Gretna , FL*, 6 FCC Rcd 633, 634 (1991).[6]

9. Accordingly, pursuant to the authority contained in Sections 4(1), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204, an 0.283 of the Commission's Rules, IT IS ORDERED, That the Petition for Rule Making (RM-6608) filed by Daniel S Tankersley to allot Channel 268A to South Lake Tahoe, California, IS DISMISSED.

10. IT IS FURTHER ORDERED, That the counterproposal (RM-7006) filed by Kidd Communications IS DISMISSED.

11. IT IS FURTHER ORDERED, That the counterproposal (RM-7005) originally filed by Modern Broadcasting Corporation IS DISMISSED.

12. IT IS FURTHER ORDERED, That the Motion To Accept filed by Ski James Broman IS DENIED and his comments ARE DISMISSED.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Belford V. Lawson, III, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Medias Bureau

[4] While Broman also suggests that the disclosure requirements of Section 73.3525 should apply when expressions of interest are withdrawn in allotment proceedings, the Commission recently held in *Marine Broadcasting* that Section 73.3525 applies to application, as opposed to allotment, proceedings. *See Marine* at para. 21.

[5] We note that Minden is listed in the 1980 U.S. Census as part of the Gardnerville-Minden, NV, census designated place.

[6] Dismissal of Broman's expression of interest in this proceeding does not preclude his filing a new petition for rule making to allot an FM channel at Minden. Such a petition should seek to demonstrate that Minden has social, economic, cultural, or governmental indicia to qualify it as a community for allotment purposes.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 79-105

In the Matter of

Detariffing the Installation and
Maintenance of Inside Wiring

THIRD REPORT AND ORDER

Adopted: November 21, 1991; Released: February 14, 1992

By the Commission:

I. INTRODUCTION

1. In the *Second Further Notice* in Docket No. 79-105,[1] this Commission began its reexamination of the regulatory framework for simple inside wiring services, in response to the decision of the United States Court of Appeals for the District of Columbia Circuit in *NARUC v. FCC*.[2] We proposed a combination of measures that we believed would result in cooperation, between this Commission and the states, in promoting the development of an increasingly competitive market for simple inside wiring services. Our proposal has five elements:

(a) the preemption of state regulation that requires or allows telephone companies to bundle charges for simple inside wiring services with charges for tariffed services;

(b) the monitoring of state actions in relation to the prices and terms and conditions of service under which telephone companies provide simple inside wiring services;

(c) a requirement that each local exchange carrier (LEC) having annual operating revenues of $100 million or more file, on an on-going basis, information on state regulation of LEC prices for inside wiring services;

(d) the non-preemption of state regulation that requires telephone companies to act as providers of last resort for inside wiring services; and

(e) a requirement that telephone companies classify inside wiring services as nonregulated activities for federal accounting purposes.[3]

2. Fifteen parties commented on the *Second Further Notice*, and nine parties replied.[4] After full consideration of the parties' positions and our own analysis, we implement each element of the above program, essentially as proposed.

II. BACKGROUND

3. The *Second Further Notice* discussed the history behind the Commission's efforts to deregulate the installation and maintenance of inside wiring. Briefly, since 1977 the Commission has taken a number of actions to ensure that each telephone company customer bears the inside wiring costs he or she causes, to increase competition for inside wiring services, to promote entry into the market for those services, and to generate cost savings that benefit consumers. These actions have helped transform inside wiring from a monopoly activity into an activity that we believe is at least susceptible to full and vigorous competition.

4. In two instances, the Commission attempted to specify how the states might regulate inside wiring services. First, the Commission required telephone companies to expense, rather than capitalize, all current inside wiring costs for intrastate ratemaking purposes.[5] In *Louisiana PSC*, the Supreme Court reversed this preemptive action.[6] The Court held that the Communications Act creates dual federal and state regulatory spheres, and that the Commission cannot specify the ratemaking policies to be applied in the state sphere unless it is not possible to have divergent federal and state policies.[7]

5. Second, the Commission precluded the states from imposing common carrier tariff regulation on the installation and maintenance of inside wiring after December 31, 1986.[8] In *NARUC v. FCC*, the D.C. Circuit agreed that the Communications Act does not preclude federal preemption of state regulation of inside wiring services when the state regulation would "necessarily thwart or impede" achievement of a valid federal policy.[9] The court held, however, that the Commission had failed to show that it was necessary to preempt all state regulation of simple inside wiring services to achieve its goals in relation to inside wiring, and remanded the case for further proceedings. The court required us to show with some specificity that state regulation would "negate" federal policy if we desire to preempt.[10]

III. DISCUSSION

A. Unbundling

1. The Proposal

6. In the *Second Further Notice*, we proposed to preempt state regulation that requires or allows telephone companies to bundle charges for simple inside wiring services with charges for tariffed services. We stated that preemption of such regulation would be consistent with *NARUC v. FCC* and would be necessary to prevent interference with our goal of promoting competition for inside wiring services. We tentatively concluded that we should require that all charges for those services be optional and unbundled from charges for other telephone services.[11]

2. The Parties' Positions

7. The parties commenting on our unbundling proposal all agree that charges for inside wiring services should be optional and unbundled from charges for other telephone services.[12] Virginia indicates, however, that although it already requires unbundled, optional charges for inside wiring services, it does not necessarily agree that this Commission has the authority to preempt the states in this area.[13] NARUC states that since we propose to limit

our preemption to unbundling, it appears our proposal goes no further than the D.C. Circuit sanctioned in *NARUC v. FCC*.[14] Bell Atlantic contends that our unbundling proposal is consistent with *NARUC v. FCC* and should be implemented.[15] NATA asserts that unbundled, optional charges are necessary to ensure effective competition in the inside wiring installation and maintenance market.[16] Other commenters argue that bundled charges for inside wiring services would inevitably interfere with our goal of promoting competition for those services, and that unbundling furthers that goal by providing customers with the option of obtaining inside wiring services from alternative sources.[17]

3. Discussion

8. In *NARUC v. FCC*, the court stated that we may require the states to unbundle charges for inside wiring services from charges for basic transmission services, because bundled charges could interfere with our goal of promoting competition for inside wiring services.[18] The parties' comments confirm that unbundled, optional charges are essential to the development of an increasingly competitive market for simple inside wiring services. Such charges permit telephone subscribers to choose among alternative providers of inside wiring services on the basis of merit. In contrast, bundled charges eliminate virtually all potential for competition for inside wiring services, since bundling forces telephone subscribers to pay telephone companies for services even when the subscribers obtain them from other sources. Clearly, bundling would thwart the policy that we described in paragraph 3, *supra*. Accordingly, we preempt state regulation that requires or allows telephone companies to bundle charges for simple inside wiring services with charges for tariffed services.

B. Price and Terms and Conditions of Service Regulation

1. The Proposal

9. In the *Second Further Notice*, we confirmed our policy that deregulation promotes the development of an increasingly competitive market for inside wiring services, and benefits consumers by reducing the total amount they pay to obtain communications services and by increasing their communications options. We recognized that unbundling would constitute a major step toward the achievement of our goals. In the interest of comity with the states, we stated that we would observe how the market for simple inside wiring services evolved subject only to an unbundling requirement. Thus, we did not propose now to consider preemption of state regulation of the prices and terms and conditions under which telephone companies provide simple inside wiring services. Instead, we proposed to monitor the states' actions, if any, in relation to prices and terms and conditions under which telephone companies provide simple inside wiring services. We suggested that we would revisit this area in the event information gained from monitoring and other sources showed that state actions were impeding federal policies or injuring consumers.[19]

2. The Parties' Positions

a. Overview

10. Although the parties generally support our goals in relation to simple inside wiring, they disagree in regard to whether our proposal would prevent the states from thwarting or impeding our efforts to achieve those goals. Some parties view our decision not to propose preemption of price and terms and conditions regulation in this proceeding as a positive step toward recognizing the value of dual regulation,[20] a major step forward in furthering a cooperative regulatory spirit,[21] or a commendable attempt to break the "preemption-appeals-reversal cycle" that assertedly has left telephone companies in the middle of an increasingly adversarial struggle between the federal and state jurisdictions.[22] Other parties maintain that monitoring will be insufficient to keep state regulation from impeding competition in the market for simple inside wiring services. These parties urge us to preempt state price and, in several instances, terms and conditions of service regulation.[23]

b. Price Regulation

11. The states agree that we should not preempt state regulation of the prices telephone companies charge for inside wiring services.[24] They contend, in addition, that there will never be a need to revisit or monitor state action in this area, because such regulation would not thwart federal policies or injure consumers.[25] Several states assert that, while they prefer to rely on competition to protect consumers, there is substantial doubt whether there is any real or potential competition in certain segments of the inside wiring market.[26] California, in particular, suggests that state regulation will not increase the total amount consumers pay to obtain communications services. According to California, if there is effective competition, LEC competitors will undercut any state-mandated price that exceeds the market price; if there is no effective competition, the price a LEC could charge in the absence of regulation would equal or exceed any price the state might prescribe.[27]

12. U S West finds it appropriate for us to monitor state price regulation to determine whether particular state regulatory provisions will interfere with federal goals. Although it sees a clear potential for such interference, U S West maintains that monitoring would enable this Commission to develop a factual record upon which to base any future preemption decision.[28] In Contel's view, monitoring could be beneficial because it would show that competition is flourishing in the inside wiring market and that preemption is not necessary to achieve Commission goals.[29] NATA argues that, although monitoring may be appropriate, this Commission must undertake its own timely review of state inside wiring tariffs and initiate enforcement action when such tariffs interfere with federal policy.[30]

13. Other LECs maintain that state regulation of prices for inside wiring services will inevitably inhibit competition and should be preempted at this time[31] or after reopening the record in this proceeding.[32] These LECs assert that inside wiring installation and maintenance cannot be severed into interstate and intrastate components and, therefore, that a failure to preempt would result in the provision of inside wiring services on a regulated basis.[33] These LECs argue that monitoring would be inad-

equate to keep price regulation from thwarting federal goals.[34] They contend that the D.C. Circuit recognized our authority to preempt such regulation when it results in the subsidization of inside wiring services by the general ratepayers. The LECs claim that state regulation which causes prices for inside wiring services to be below the market prices would create such a cross-subsidy.[35] They also contend that state regulation that sets inside wiring prices above the market prices would make carriers unable to compete effectively and thereby reduce competition within the inside wiring market.[36] Bell Atlantic argues, in addition, that even if the states were able to duplicate market prices through regulation, regulatory delay would keep the carriers from reacting promptly to changing circumstances and, therefore, make the market less than fully competitive.[37]

14. GTE, NYNEX, Rochester, and U S West are concerned that states which regulate inside wiring prices may decide that only a portion of a company's inside wiring costs should be considered intrastate, and set inside wiring rates on that basis.[38] U S West and Rochester assert that such regulation would leave telephone companies with no mechanism to recover their remaining inside wiring costs[39] and would be confiscatory.[40] NYNEX argues that, while it might be theoretically possible to have a separate contract charge to recover costs not recovered through the state-mandated price, such a charge would be impractical.[41] GTE contends that we can avoid this problem, if we decide not to preempt all state price regulation, by preempting state action that prevents telephone companies from imposing and collecting nonregulated charges for "interstate" inside wiring services. According to GTE, this preemption would embrace state tariffs covering "interstate" as well as "intrastate" inside wiring services.[42] Arkansas finds GTE's suggestion troubling and asserts that its implementation would not foster a spirit of comity between this Commission and the states.[43]

c. Terms and Conditions of Service Regulation

15. The states and several LECs support our decision not now to consider preemption of state regulation of the terms and conditions under which telephone companies provide simple inside wiring services. The states argue that such regulation will not impede our policies.[44] The LECs that support our decision maintain that monitoring should be sufficient to keep state terms and conditions of service regulation from having that effect.[45]

16. Centel, NYNEX, Rochester, and United assert, however, that we should preempt state terms and conditions regulation, because such state regulation would inhibit the ability of the common carrier to respond flexibly in the inside wiring market and may deter other suppliers from competing in that market.[46] These companies claim that states could mandate sales techniques, warranty provisions, and minimum repair intervals that could competitively disadvantage telephone company inside wiring operations.[47]

3. Discussion

17. In the *Second Further Notice*, we declined, in the interest of comity with the states, to consider at this time preemption of state regulation of the prices and terms and conditions under which telephone companies provide simple inside wiring services. We believed that cooperation between this Commission and the states would serve consumers far better than would any alternative approach. We recognized, however, that there might be instances in which state regulation threatened to thwart or impede our ability to achieve our goals. We proposed a monitoring program that appeared sufficient to detect any such state regulation, and we stated that we might revisit our decision not to propose preemption in the event state regulation impeded federal policies and injured consumers.

18. We are encouraged by the states' responses to our proposal. Those responses make clear that, although there may be disagreement on interim measures, there is no disagreement on the ultimate goal of full competition in the market for simple inside wiring services. We believe that this lack of ultimate disagreement confirms our decision not to consider preemption of state regulation of the prices and terms and conditions for simple inside wiring services in this proceeding. We also believe that, in most instances, any disagreement there might be on state regulatory measures will arise from differing perceptions as to how consumer benefits might be maximized as the market for simple inside wiring services evolves to a fully competitive state. We believe that we should not assume that the states will select regulatory measures that threaten federal interests. On the contrary, it appears that the impact of any particular measure on federal interests may depend on state and local circumstances that might vary significantly over time. Therefore, we do not preempt price or terms and conditions regulation at this time, and we decline to reopen the record in this proceeding in order to examine whether particular regulatory measures now warrant preemption.

19. In deciding not to preempt state price or terms and conditions regulation at this time, we recognize that, if rates were set at a very low level, state regulation could improperly result in rates for simple inside wiring services that deny LECs a reasonable opportunity to recover their inside wiring costs from their customers. GTE suggests that we should preclude this, in the event we do not preempt all state regulation of prices for simple inside wiring services, by preempting that state regulation which would preclude telephone companies from imposing unlimited, nonregulated, "interstate" charges for simple inside wiring services that fall within both this Commission's and the state commissions' jurisdictions.[48] We reject this suggestion because we believe that its implementation would be tantamount to a preemption of all state regulation of such prices.[49] If we were going to preempt such state regulation, we would do so directly and only after determining that the state regulation would thwart or impede achievement of our policies.[50] We decline to make such a finding based on the record in this proceeding.

20. We also reject the states' suggestion that we not monitor their actions in relation to inside wiring. While states share our goal of fully competitive market for simple inside wiring services, in view of our decision not to preempt price or terms and conditions regulation in this proceeding, it is possible that states may take actions that would thwart or impede federal goals. Monitoring state action will enable us to assess any adverse impact on federal goals. We will not hesitate to initiate enforcement proceedings in the event our monitoring shows that state price or terms and conditions regulation is interfering with federal policy.

21. In our monitoring, we intend to consider all aspects of any state regulatory program that may be adopted for simple inside wiring services, including the record, if any, that accompanies the program's adoption. While we are not preempting price or terms and conditions regulation at this time, we note that the D.C. Circuit has specifically recognized our authority to preempt state tariffs that result in ratepayer subsidization of telephone company inside wiring operations[51] and that certain LECs have argued that the states should not be allowed to regulate simple inside wiring services in a manner that precludes recovery of all costs of those services.[52] In this regard, it is important to observe that this Commission requires carriers to allocate their costs between regulated and nonregulated activities using a fully distributed costing methodology, based on cost causality, to help ensure that interstate rates neither subsidize nor are subsidized by telephone company inside wiring operations.[53] In our review of any regulation of simple inside wiring services by state regulators, we intend to consider whether the state methodology is consistent with these federal policies and whether, in light of our determination in this regard, we should require changes to keep the state from thwarting or impeding federal policies.

C. Filing Requirement

1. The Proposal

22. In the *Second Further Notice*, we stated that it might simplify our monitoring if we were to obtain, on an on-going basis, current information on state regulation of the prices telephone companies charge for inside wiring services. We proposed to require each LEC having annual operating revenues of $100 million or more to file, within thirty days of the document's release, copies of any state statute, rule, order, or other document that regulates, or proposes to regulate, those prices. We anticipated that this requirement would help us become aware of any state regulation that might threaten federal policies with regard to inside wiring services, without unduly burdening the industry or infringing on state interests.[54]

2. The Parties' Positions

23. The parties commenting on our filing proposal generally agree that the information we proposed to obtain would help us monitor state regulation of inside wiring services. Contel, United, and USTA maintain, however, that it is not necessary to impose a filing requirement on all LECs whose annual operating revenues are $100 million or more. United asserts that we should not require multiple filings of documents that apply to all LECs within a jurisdiction.[55] Contel argues that we should require only the LEC serving the greatest number of access lines within a given state to file information regarding state price regulation.[56] USTA suggests that we apply our proposed requirement only to the largest LEC within a state unless the state adopts different requirements for different carriers.[57]

24. NTCA observes that state measures seeking to regulate the prices larger LECs charge for inside wiring services probably will also apply to smaller LECs. To help these LECs monitor and respond to state proceedings, NTCA requests that we provide public notice of any documents submitted in response to our filing requirement.[58]

3. Discussion

25. We believe that obtaining current information on state regulation of inside wiring prices will facilitate our monitoring efforts without unduly burdening the industry. We are sensitive, however, to Contel's, United's, and USTA's concern that we not require duplicative filings. Accordingly, the rule we adopt requires that only one LEC need file any document that applies to more than one LEC having annual operating revenues of $100 million or more. The filing LEC would be the LEC to which the document applies that serves the greatest number of access lines within the relevant state. We anticipate that these filings and other documents obtained through our monitoring will describe the costing methodology used by those states, if any, that regulate telephone company prices for simple inside wiring services. This information should help us determine whether those prices thwart federal policies.[59]

26. We agree with NTCA that smaller LECs may wish to monitor and respond to state proceedings regarding the prices and terms and conditions under which these LECs provide inside wiring services. However, we do not believe that we need to issue public notices of actions in this regard. The LECs' filings will be available for public inspection and copying to the extent consistent with our rules regarding disclosure of agency records.[60] This should be sufficient to assist the LECs in their review. Accordingly, we will not implement NTCA's suggestion that we provide public notice of each LEC submission in response to our filing requirement.

D. Provider of Last Resort Regulation

1. The Proposal

27. In the *Second Further Notice*, we tentatively concluded that we should not preempt state regulation that requires LECs to function as providers of last resort for inside wiring services. We stated that a LEC becomes a customer's provider of last resort only if the customer is unable to obtain adequate inside wiring services from other sources and that state regulation that is carefully drawn to address such a marketplace failure would threaten no federal policy.[61]

2. The Parties' Positions

28. The states support our proposal not to preempt provider of last resort regulation. NYDPS commends this Commission for recognizing state authority to protect those consumers who may not have competitive alternatives for inside wiring services. NYDPS asserts that in those circumstances state regulators have an obligation to ensure that customers not only have a provider of last resort, but also that the services offered by that provider are comparable in price and quality to those available in competitive markets.[62] Virginia argues that the states are much better situated than this Commission to assess the inside wiring demand and supply status in a given area.[63]

29. Bell Atlantic and Contel agree that our proposal is an appropriate accommodation of state interests that will threaten no federal policies.[64] United, while understanding the need for provider of last resort regulation, is concerned that it may be inconsistent with our goal of furthering competition in the market for inside wiring services.[65] NYNEX asks that we require that when states mandate that telephone companies act as providers of last

resort for inside wiring services, the states must permit the companies to provide such services on a compensatory and untariffed basis.[66] GTE indicates that we should preclude the states from regulating inside wiring prices even when telephone companies are acting as providers of last resort.[67]

3. Discussion

30. The parties' comments confirm that provider of last resort regulation that is carefully drawn to address a marketplace failure threatens no federal policies and that we should not preempt such regulation. Accordingly, we implement our proposal in this regard. In the interest of comity, we decline the companies' invitations that we preclude the states from regulating the prices telephone companies charge when acting as providers of last resort or specify criteria for the states to apply in regulating these prices. If any state undertakes such regulation, information on that action would be filed with this Commission.[68] We will review that information as part of our monitoring effort and take whatever action, if any, we deem appropriate based on that review.

E. Classification of Inside Wiring Services for Federal Accounting Purposes

1. The Proposal

31. In the *Joint Cost Order*,[69] the Commission adopted a system of accounting separation designed to ensure that interstate ratepayers do not bear the costs and risks of the telephone companies' nonregulated ventures. This system is a "cost allocation, then separations" system. It requires all carriers subject to our joint cost rules to classify certain activities as regulated and other activities as nonregulated for federal accounting purposes. The carriers allocate their costs and revenues between these activity groups in accordance with causality, and exclude the nonregulated costs and revenues from the jurisdictional separations process and from interstate revenue requirement computations. A "separations, then cost allocation" system, in contrast, would require carriers to divide all their costs and revenues between the interstate and the intrastate jurisdictions. The carriers would thereafter allocate the interstate and, in states that so require, the intrastate portions of their costs and revenues between regulated and nonregulated activities.

32. Our rules specify that activities deregulated at the interstate level, but not preemptively deregulated, are to be classified as regulated for federal accounting purposes until such time as this Commission decides otherwise.[70] In the *Second Further Notice*, we proposed that simple inside wiring services should be classified as nonregulated activities for federal accounting purposes.[71] The implementation of this proposal would continue, on a permanent basis, the federal accounting treatment that predated *NARUC v. FCC* and that has continued on an interim basis since that decision.[72]

33. In proposing the nonregulated classification, we tentatively concluded that its continuation would not infringe on the states' authority over intrastate accounting and ratemaking matters. We also tentatively concluded that our current "cost allocation, then separations" system is superior to any possible alternative system under which inside wiring services would be classified as regulated activities for federal accounting purposes or the costs and revenues from inside wiring services would be subject to the jurisdictional separations process. We indicated that any conversion to an alternative system of ensuring that interstate ratepayers do not bear the costs and risks of the telephone companies' inside wiring activities would impose unnecessary burdens on this Commission and the industry.[73]

2. The Parties' Positions

34. A number of parties commented on our proposal to require that simple inside wiring services be classified as nonregulated activities for federal accounting purposes on a permanent basis. Two of these parties, California and NARUC, favor a regulated classification and contend that this Commission must subject inside wiring costs and revenues to the jurisdictional separations process.[74] One party, Pacific, asks that we defer the classification issue to give the parties an opportunity to comment on the accounting ramifications of our recent order redefining the demarcation point.[75] The remaining parties, Virginia, USTA, and several telephone companies, either favor[76] or do not oppose[77] a nonregulated classification.

35. California contends that Sections 2(b)(1) and 410(c) of the Communications Act of 1934, as amended,[78] *NARUC v. FCC*, *California v. FCC*,[79] and *Hawaiian Telephone Company v. PUC*[80] require that we subject inside wiring costs and revenues to the jurisdictional separations process. California argues that inside wiring is used for both interstate and intrastate communications, and that we have no lawful alternative to subjecting such dual use facilities to the jurisdictional separations process. According to California, in the absence of complete federal preemption of state regulation of inside wiring services, this Commission must either provide the states with an appropriately defined basis upon which to set the charges for those services or clearly and unequivocably delegate authority to the states to make jurisdictional separations determinations respecting those services.[81]

36. California maintains that the *Inside Wiring Accounting Order*, which continued the nonregulated classification pending our decision on the permanent classification, failed to come to grips with California's argument that inside wiring costs must be subjected to the jurisdictional separations process to provide the states with an appropriate basis for regulating the prices for inside wiring services. California asserts that this Commission's authority extends only to the portion of inside wiring costs incurred to provide interstate services and that jurisdictional separations procedures are necessary to determine where the federal sphere ends and the state sphere begins.[82] California requests that we clarify our policies in regard to state regulation of inside wiring services and, in particular, to state whether we intend "to accord the states the right to assign *all* inside wire services costs to the intrastate jurisdiction, thereby authorizing the recovery of all those costs in rates set by the state."[83]

37. NARUC contends that the D.C. Circuit expected and assumed in *NARUC v. FCC* that we would subject inside wiring costs and revenues to the jurisdictional separations process and that administrative difficulties provide no reason for failing to invoke the jurisdictional separations process. NARUC asks that we abandon our tentative conclusion favoring the nonregulated classification and refer the classification issue to a Joint Board.[84]

38. Virginia asserts that the classification issue is a federal issue and that we should be free to regulate interstate accounting as we deem appropriate, provided the states are free to account for inside wiring differently for intrastate ratemaking purposes.[85] The LECs and USTA maintain that a nonregulated classification is consistent with the Communications Act, judicial precedent, and our goal of ensuring that carriers, not ratepayers, bear the costs of providing competitive services.[86] Ameritech, in particular, claims that implementation of our accounting proposal would not constitute an exercise of jurisdiction over intrastate matters.[87]

39. The LECs and USTA also maintain that a conversion to a "separations, then cost allocation" system would impose significant burdens on carriers and ratepayers without any corresponding benefits.[88] Southwestern contends that a nonregulated classification would minimize LEC administrative and record keeping expenses without infringing on state regulatory authority.[89] U S West asks that we proceed cautiously in determining the appropriate federal accounting classification for inside wiring because that classification will need to be reconciled with a future determination for enhanced services.[90]

3. Discussion

a. Overview

40. We believe that neither the Communications Act nor judicial precedent precludes our requiring that carriers subject to our joint cost rules classify all inside wiring services as nonregulated activities for federal accounting purposes. We also believe that while that classification will result in the continued exclusion of inside wiring costs and revenues from the jurisdictional separations process, it will not infringe on the states' authority over intrastate accounting and ratemaking. We further believe that continuation of the nonregulated classification will help ensure that interstate ratepayers do not bear the costs and risks of the telephone companies' inside wiring activities. Accordingly, we implement our proposal to continue that classification on a permanent basis.

b. Authority to Require a Nonregulated Classification

41. As an initial matter, we note that the parties that favor a regulated classification appear to have an unduly restrictive understanding of the states' power in relation to simple inside wiring services. These parties assume that, even in the absence of federal preemption, the states will be unable to exercise their jurisdiction to set rates for those services because the interstate sphere will not have been identified through the jurisdictional separations process.[91] However, as stated above,[92] in the interest of comity with the states, we have determined not to preempt in this proceeding state authority over the prices telephone companies charge for simple inside wiring services. Thus, each state is free to regulate--or to decline to regulate--the prices for simple inside wiring services.

42. This state authority over simple inside wiring services is, of course, subject to our authority to preempt state regulation that thwarts or impedes achievement of our policies. However, in the absence of such preemption, our "cost allocation, then separations" system does not preclude those states, if any, that choose to regulate telephone company prices for simple inside wiring services from assigning the telephone companies' simple inside wiring services costs to the intrastate jurisdiction and setting unbundled rates based on those costs. State commissions that have jurisdiction over, or that wish to regulate, only a portion of simple inside wiring services are capable of identifying the costs of that portion. Subjecting inside wiring costs and revenues to the jurisdictional separations process would only limit the states' options in this regard.[93]

43. We recognize, of course, that we could not require the nonregulated classification if the Communications Act mandated that we apply jurisdictional separations procedures to inside wiring costs and revenues. There is, however, no such mandate. Our authority over jurisdictional separations stems from Sections 221(c) and 410(c) the Act.[94] Section 221(c) states that this Commission "*may* classify the property" of any carrier engaged in wire telephone communication and "determine what property of said carrier shall be considered as used in interstate or foreign telephone toll service."[95] As we held in the *Inside Wiring Accounting Order*, this language establishes that Congress did not intend to require us to apply jurisdictional separations procedures to inside wiring services. By permitting, but not requiring, us to determine what carrier property should be considered as used in interstate or foreign services, Congress made clear that we need not identify the portion of total inside wiring costs that are incurred to provide interstate, rather than intrastate, services.[96] Section 410(c), in turn, applies to "proceeding[s] regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations . . . ."[97] It does not require us to apply jurisdictional separations procedures to services, like inside wiring installation and maintenance, that are not common carrier services.[98] Nor does it require us to convene a Joint Board to consider whether we should prescribe jurisdictional separations procedures for services, like inside wiring, that we do not regulate.[99]

44. The parties also suggest that we must subject inside wiring costs and revenues to the jurisdictional separations process because the court in *NARUC v. FCC* anticipated such action. We find no support for this argument in the court's opinion. Indeed, the court specifically recognized that under our rules "an activity deregulated only at the federal level *may* still be subject to the jurisdictional separations process."[100] This language demonstrates that, if the court had any expectations regarding our actions on remand, it anticipated that we would determine, in the exercise of our discretion, whether inside wiring costs and revenues should be subject to that process.

45. The parties argue further that *NARUC v. FCC* and *California v. FCC* implicitly rejected the proposition that we may exclude services that we determine not to be common carrier services from the jurisdictional separations process. Those opinions addressed, however, whether we may preclude the states from regulating services provided in connection with intrastate common carrier services and held that we may do so only to keep the states from thwarting or impeding achievement of our policies.[101] They did not address whether we must participate, as we would if we were to apply jurisdictional separations procedures to inside wiring, in the state regulatory process.

46. Finally, *Hawaiian Telephone Co. v. PUC* does not suggest that we must subject inside wiring costs and revenues to the jurisdictional separations process. That case addressed the applicability of the jurisdictional separations

process "[w]hen the same plant and equipment is used to provide both interstate and intrastate services and different authorities set rates for these respective services."[102] It did not hold or imply that we must subject activities that are deregulated in the interstate jurisdiction, but not preemptively deregulated, to the jurisdictional separations process.

c. Cost-benefit Analysis

47. Since, as the foregoing makes clear, continuation of the nonregulated classification for inside wiring is not precluded and will not infringe on state authority over intrastate matters, we believe that we should select the permanent accounting classification that will better advance our goal of ensuring that interstate ratepayers will not bear the costs and risks of the telephone companies' inside wiring ventures.[103] We are convinced that the nonregulated classification and the associated "cost allocation, then separations" system is superior in this regard. Any alternative system under which inside wiring services would be classified as regulated activities for federal accounting purposes would be both unduly costly and less effective than our current system in preventing cross-subsidization.

48. Our current system, with its nonregulated classification for inside wiring services, has numerous interrelated components. It includes our cost allocation and access charge rules, the cost allocation manuals and other internal accounting processes carriers use to implement those rules, our independent auditor requirement, our automated reporting management information system (ARMIS) as well as associated forms and software. We have devoted two major Rule Making proceedings[104] and numerous orders to the design and implementation of this system.[105] It has been instrumental in our efforts to protect ratepayers against cross-subsidization.

49. We believe that we should devote our resources to improving this system,[106] and not to the process of converting to a "separations, then cost allocation" system under which inside wiring services would be classified as a regulated activity for federal accounting purposes. Our experiences in designing and implementing our current system make clear that any such conversion would be a massive undertaking. It would require us to revisit and, in many instances, fundamentally change many aspects of our current system. Carriers, in turn, would have to change their internal accounting systems, including their cost allocation manuals, to accommodate the new system. We would have to review the carriers' changes and, as we did with our current system, require additional changes where appropriate. In addition, if we wished to evaluate either the new system or the effects of our overall policies in any meaningful way, we would have to devise, and carriers would have to implement, a reliable method for restating data submitted under our current system.

50. We also believe that, instead of providing benefits that might be commensurate with its costs, a "separations, then cost allocation" system for inside wiring services would reduce our ability to prevent cross-subsidization. Under our current system, telephone companies allocate their costs between regulated and nonregulated activities using the dollar amounts recorded in their accounts. By reviewing the companies' cost allocation methods, we are able to determine whether the allocation results are likely to be consistent with cost causality. Under a "separations, then cost allocation" system, the dollar amounts recorded in the companies' accounts would go through a process that reflects "unavoidable inaccuracies and intentional policy choices, and individual judgments" in addition to cost causality,[107] prior to being allocated between regulated and nonregulated activities. If we were to convert to such a system, we would have to "unscramble the separations egg" before we could begin the process of determining whether cost allocation results are likely to be consistent with cost causality.

51. We further believe that converting to a "separations, then cost allocation" system would increase the on-going costs of protecting against cross-subsidization. The ongoing costs of a "separations, then cost allocation" system for inside wiring services would be greater for at least two reasons. First, such a system would be more complicated than any comparable "cost allocation, then separations" system for inside wiring services. The additional complexity would arise because the jurisdictional separations process divides costs between the interstate and intrastate jurisdictions, rather than between regulated and nonregulated activities. Because of this difference in purpose, separations can and does employ cost categories that are far broader than those necessary to ensure that costs are allocated between regulated and nonregulated activities in accordance with causality.[108] Under our current system, telephone companies need to track the disaggregated costs only through the cost allocation process. Under a "separations, then cost allocation" system, these disaggregated costs would have to be tracked through both the jurisdictional separations and the cost allocation processes.

52. Second, as a consequence of this additional complexity, a "separations, then cost allocation" system for inside wiring services would be unnecessarily expensive to audit. Our current system requires each LEC having over $100 million in annual operating revenues to have an independent auditor provide a positive opinion on the carrier's cost allocation methodologies and results.[109] These independent audits enable us to use our auditing resources efficiently in determining whether cost allocation results reflect causality. Under a "separations, then cost allocation" system, we would have to expand our resources significantly in order to achieve the same level of confidence in cost allocation results.[110]

F. BellSouth Requests

53. When a field technician responds to a customer trouble report, he or she must drive to the customer premises, obtain access to that premises, and determine whether the problem is on the company's, as opposed to the customer's, side of the demarcation point, prior to performing any repair work. BellSouth requests that we determine in this proceeding that all costs telephone company technicians incur in determining the source of the trouble be classified as regulated for federal accounting purposes whenever the state having jurisdiction considers them regulated for intrastate purposes. BellSouth also requests an identical determination with regard to all costs associated with calls in which the telephone company technician is unable to gain access to the customer premises (no access costs) or, having gained access, is unable to find the cause of the trouble (no trouble found costs).[111] USTA supports these requests.[112] NATA, however, opposes them, and argues that the costs of these visits should be allocated between regulated and nonregulated activities.[113]

54. BellSouth's requests raise matters lying outside the scope of the *Second Further Notice*. We will not address them in this proceeding.[114]

IV. PAPERWORK REDUCTION ACT

55. The rule adopted in this Order has been analyzed with respect to the Paperwork Reduction Act of 1980[115] and found to impose a new or modified information collection requirement on the public. This requirement is subject to approval by the Office of Management and Budget as prescribed in that Act.

V. CONCLUSION

56. This Order concludes a Docket that since its inception in 1979 has witnessed, and at times caused, numerous changes in the telecommunications industry. We believe that we should close this Docket by restating our policies regarding state regulation of inside wiring services. We anticipate that this restatement will help foreclose disputes regarding the extent of the states' authority in the absence of federal preemption of state regulation of the prices and terms and conditions under which telephone companies provide simple inside wiring services.

57. First, while we encourage the states not to regulate simple inside wiring services, we have not preempted state regulation of the prices and terms and conditions under which telephone companies provide those services. In view of this absence of preemption, we have not precluded those states, if any, that choose to regulate the prices under which telephone companies provide simple inside wiring services from assigning the telephone companies' simple inside wiring costs and revenues to the intrastate jurisdiction for intrastate accounting purposes, and from setting unbundled rates based on those costs.

58. Second, we have not precluded the states from assigning complex wiring costs and revenues to the intrastate jurisdiction for intrastate accounting purposes. Although the states are preempted from setting rates for complex wiring services,[116] they are not preempted from imputing costs and revenues from those services or from simple inside wiring services in proceedings to set rates for properly tariffed, intrastate services.[117]

59. Third, the states may regulate the terms and conditions under which telephone companies provide simple inside wiring services, as long as the states do not require or permit terms and conditions that are inconsistent with the technical standards set forth in Part 68 of our Rules.[118] The states are preempted from regulating the terms and conditions under which telephone companies provide complex wiring services. We, of course, retain jurisdiction over interstate accounting and ratemaking matters, and will monitor the states' actions in relation to inside wiring to ensure that they do not impede our ability to achieve our policies.

VI. ORDERING CLAUSES

60. Accordingly, IT IS ORDERED, that pursuant to Sections 1, 4(i), 4(j), 201-205, 218-220, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154(i), 154(j), 201-05, 218-20, and 403, no state shall require or allow telephone companies to bundle charges for simple inside wiring services with charges for tariffed services.

61. IT IS FURTHER ORDERED, that pursuant to Sections 1, 4(i), 4(j), 201-205, 218-220, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154(i), 154(j), 201-05, 218-20, and 403, Part 43 of this Commission's Rules IS AMENDED by adding Section 43.41 as set forth in Appendix B below. This amendment shall become effective 80 days following the publication of the text of the rule in the Federal Register.

62. IT IS FURTHER ORDERED, that pursuant to Sections 1, 4(i), 4(j), 201-205, 218-220, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154(i), 154(j), 201-05, 218-20, and 403, telephone companies shall classify their inside wiring operations as nonregulated activities for federal accounting purposes.

63. IT IS FURTHER ORDERED, that the Secretary shall serve a copy of this Third Report and Order on state regulatory commissions.

64. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parties: Consideration of the Second Further Notice of Proposed Rule Making, CC Docket No. 79-105

I. Filing Comments:

1.) The Bell Atlantic Telephone Companies (Bell Atlantic);

2.) The BellSouth Companies, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth);

3.) The People of the State of California and the Public Utilities Commission of the State of California (collectively, California);

4.) Contel Corporation (Contel);

5.) GTE Service Corporation and its Affiliated Domestic Telephone Operating Companies (GTE);

6.) National Telephone Cooperative Association (NTCA);

7.) New England Telephone and Telegraph Company and New York Telephone Company (NYNEX);

8.) New York State Department of Public Service (NYDPS);

9.) North American Telecommunications Association (NATA);

10.) Pacific Bell (Pacific);

11.) Southwestern Bell Telephone Company (Southwestern);

12.) United States Telephone Association (USTA);

13.) United Telephone System Companies (United);

14.) U S West Communications (U S West); and

15.) Virginia State Corporation Commission (Virginia).

II. Filing Replies:

1.) Ameritech Operating Companies (Ameritech);

2.) Arkansas Public Service Commission (Arkansas);

3.) Bell Atlantic;

4.) Central Telephone Company (Centel);

5.) NATA;

6.) National Association of Regulatory Utility Commissioners (NARUC);

7.) Rochester Telephone Corporation (Rochester);

8.) USTA; and

9.) United.

APPENDIX B

Part 43 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 43 -- REPORTS OF COMMUNICATION COMMON CARRIERS AND CERTAIN AFFILIATES

1. The authority citation for Part 43 is revised to read as follows:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 211, 219, 220, 48 Stat. 1073, 1077, as amended; 47 U.S.C. 211, 219, 220.

2. Section 43.41 is added to read as follows:

§43.41 Reports on Inside Wiring Services.

Each local exchange carrier with annual operating revenues of $100 million or more shall file, within thirty (30) days of its publication or release, a copy of any state or local statute, rule, order, or other document that regulates, or proposes to regulate, the price or prices the local exchange carrier charges for inside wiring services. This rule applies only to the local exchange carrier serving the greatest number of access lines within the portions of the state that are, or would be, subject to the state regulation.

FOOTNOTES

[1] Detariffing the Installation and Maintenance of Inside Wiring, Second Further Notice of Proposed Rule Making, 5 FCC Rcd 3407 (1990)(*Second Further Notice*).

[2] *National Association of Regulatory Utility Commissioners v. FCC*, 880 F.2d 422 (D.C. Cir. 1989)(*NARUC v. FCC*).

[3] We did not propose to, and do not, revisit the Commission's decision to preempt state regulation of complex wiring services, since that decision had become final. *See Second Further Notice*, 5 FCC Rcd at 3411, n.2.

[4] Appendix A lists the comments and replies as well as the abbreviations this *Report and Order* uses to identify the parties.

[5] Amendment of Part 31, Uniform System of Accounts for Class A and B Telephone Companies, 92 FCC 2d 864 (1983)(*Depreciation Preemption Order*), *rev'd, Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355 (1986)(*Louisiana PSC*). The Commission had previously required telephone companies to expense their current inside wiring costs for interstate purposes. Amendment of Part 31, Uniform System of Accounts for Class A and B Telephone Companies, 85 FCC 2d 818, 828-29 (1981)(*Expensing Order*), *recon.*, 89 FCC 2d 1094 (1982), *further recon.*, *Depreciation Preemption Order*, *supra*.

[6] 476 U.S. at 379.

[7] *Id.* at 375 & n.4.

[8] Detariffing the Installation and Maintenance of Inside Wiring, 51 Fed. Reg. 8498 (Mar. 12, 1986)(*Second Report and Order*), *recon.*, 1 FCC Rcd 1190 (1986)(*Reconsideration Order*), *further recon.*, 3 FCC Rcd 1719 (1988)(*Further Reconsideration Order*), *remanded, NARUC v. FCC*, *supra*.

[9] *NARUC v. FCC*, 880 F.2d at 430.

[10] *Id.* at 430-31.

[11] *Second Further Notice*, 5 FCC Rcd at 3409, para. 18.

[12] *E.g.*, Bell Atlantic Comments at 4-5; Contel Comments at 2; NATA Comments at 3-4; NYNEX Comments at 3; United Comments at 3; USTA Comments at 2-3.

[13] Virginia Comments at 1-2.

[14] NARUC Reply at 1.

[15] Bell Atlantic Comments at 4-5.

[16] NATA Comments at 3-4.

[17] *E.g.*, Contel Comments at 2; United Comments at 3.

[18] *NARUC v. FCC*, 880 F.2d at 430.

[19] *Second Further Notice*, 5 FCC Rcd at 3408-3410, paras. 14-24.

[20] NYDPS Comments at 1.

[21] Virginia Comments at 1; Arkansas Reply at 1.

[22] U S West Comments at 11-12.

[23] *E.g.*, Bell Atlantic Comments at 2; GTE Comments at 9-10; NYNEX Comments at 11; United Comments at 3-6; Centel Reply at 3; Rochester Reply at 3.

[24] California Comments at 1-4; NYDPS Comments at 1-2; Virginia Comments at 2; Arkansas Reply at 1-2; NARUC Reply at 4.

[25] *E.g.*, Virginia Comments at 2.

[26] California Comments at 2-3; Arkansas Reply at 1-2.

[27] California Comments at 2-3.

[28] U S West Comments at at 7-8.

[29] Contel Comments at 2.

[30] NATA Comments at 4-5.

[31] Bell Atlantic Comments at 5-7; GTE Comments at 9; United Comments at 7; Rochester Reply at 3-8; USTA Reply at 2-4.

[32] NYNEX Comments at 6.

[33] GTE Comments at 4-7; NYNEX Comments at 6-9, 14; Rochester Reply at 4-5.

[34] *E.g.*, Bell Atlantic Comments at 2; GTE Comments at 13.

[35] Bell Atlantic Comments at 6; NYNEX Comments at 11; United Comments at 4.

[36] Bell Atlantic Comments at 7; NYNEX Comments at 11; United Comments at 4.

[37] Bell Atlantic Comments at 7.

[38] GTE Comments at 11-15; NYNEX Comments at 8-10; U S West Comments at 8-9; Rochester Reply at 4-5.

[39] U S West Comments at 8-9.

[40] Rochester Reply at 5-6.

[41] NYNEX Comments at 8-10.

[42] GTE Comments at 11-15.

[43] Arkansas Reply at 2.

[44] California Comments at 5; NYDPS Comments at 1; Virginia Comments at 2; Arkansas Reply at 1-2; NARUC Reply at 4.

[45] Bell Atlantic Comments at 2; GTE Comments at 9-10; U S West Comments at 7-9; *see also* USTA Reply at 2.

[46] NYNEX Comments at 11; United Comments at 5-6; Centel Reply at 3-4; Rochester Reply at 3.

[47] *E.g.*, United Comments at 5-6.

[48] *See* para. 14, *supra*.

[49] Implementation of GTE's suggestion would, for example, enable a telephone company that wished to charge $10.00 for a particular simple inside wiring service to accomplish its objective in spite of any state regulation. If the state were to specify a rate of $4.00 for the "intrastate" portion of the service, the company could charge $6.00 for the nonregulated portion. If the "intrastate" rate were $9.00, the nonregulated charge could be $1.00.

[50] *See NARUC v. FCC*, 880 F.2d at 430.

[51] *NARUC v. FCC*, 880 F.2d at 430.

[52] *See* para. 14, *supra*.

[53] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, 2 FCC Rcd 1298 (1987)(*Joint Cost Order), recon.*, 2 FCC Rcd 6283 (1987), *further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom.* Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

[54] *Second Further Notice*, 5 FCC Rcd at 3409, para. 22; *id.* at 3409-10, para. 24.

[55] United Comments at 5, n.10.

[56] Contel Comments at 2.

[57] USTA Reply at 3.

[58] NTCA Comments at 2-3.

[59] *See* para. 21, *supra*.

[60] *See* 47 C.F.R. §§0.457, 0.459.

[61] *Second Further Notice*, 5 FCC Rcd at 3410, paras. 25-26.

[62] NYDPS Comments at 2.

[63] Virginia Comments at 2.

[64] Bell Atlantic Comments at 10; Contel Comments at 2.

[65] United Comments at 5, n.11.

[66] NYNEX Comments at 4, 18-19.

[67] GTE Comments at 1.

[68] *See* para. 25, *supra*.

[69] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, 2 FCC Rcd 1298 (1987)(*Joint Cost Order), recon.*, 2 FCC Rcd 6283 (1987), *further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom.* Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

[70] 47 C.F.R. §32.23(a). We note that our rules specify use of a regulated classification until such time as we decide to to the contrary not from any preference for that classification, but "[t]o avoid future confusion" regarding the accounting classification of activities deregulated only in the interstate jurisdiction. *Joint Cost Order*, 2 FCC Rcd at 1309, para. 79.

[71] *Second Further Notice*, 5 FCC Rcd at 3410, para. 28.

[72] *See* Classification of Inside Wiring Services for Accounting Purposes, 5 FCC Rcd 3521 (1990)(*Inside Wiring Accounting Order), denying review*, Responsible Accounting Officers Letter 14, Classification of Inside Wiring Services for Accounting Purposes, 4 FCC Rcd 7110 (Com.Car.Bur. 1989)(*RAO Letter 14)*. In a companion Order, we deny reconsideration of the *Inside Wiring Accounting Order*. Classification of Inside Wiring Services for Accounting Purposes, FCC 91-387 (adopted November 21, 1991). For convenience, this Order refers to the proceedings on reconsideration of the *Inside Wiring Accounting Order* as the interim accounting classification proceeding.

[73] *Second Further Notice*, 5 FCC Rcd at 3410, paras. 28-29.

[74] California Comments at 4-5; NARUC Reply at 1-4. The Public Service Commission of the District of Columbia (D.C. PSC) and the Maine Public Utilities Commission (Maine) take similar positions in the interim accounting classification proceeding.

[75] Pacific Comments at 2-3, *citing* Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, 5 FCC Rcd 4686 (1990), *petitions for recon. pending*.

[76] *E.g.*, Bell Atlantic Comments at 9-10; Contel Comments at 2; GTE Comments at 12; Southwestern Comments at 1-2; United Comments at 6; USTA Comments at 4-5; Ameritech Reply at 1-6.

[77] Virginia Comments at 2.

[78] 47 U.S.C. §§152(b)(1), 410(c).

[79] 905 F.2d 1217 (9th Cir. 1990).

[80] 827 F.2d 1264 (9th Cir. 1987), *cert. denied*, 403 U.S. 923 (1988).

[81] California Comments at 4-5 & Appendix.

[82] California Comments at Appendix A, p. 8; *see also* Maine Comments, Interim Accounting Classification Proceeding, at 3.

[83] California Reply, Interim Accounting Classification Proceeding, at 4 (emphasis in original).

[84] NARUC Reply at 2-4.

[85] Virginia Comments at 2.

[86] *E.g.*, Bell Atlantic Comments at 9; Ameritech Reply at 4-6; Southwestern Comments at 1-4; USTA Reply at 3.

[87] Ameritech Reply at 2.

[88] *E.g.*, Bell Atlantic Reply at 3-5; Centel Reply at 7-8.

[89] Southwestern Comments at 1-2; *see also* United Comments at 6; Contel Comments at 2.

[90] U S West Comments at 10-15, *citing, California v. FCC, supra*.

[91] These arguments are also raised in our interim accounting classification proceeding. *See* note 72, *supra*. We have considered the arguments raised in that proceeding in selecting a permanent accounting classification for inside wiring.

[92] *See* paras. 17-19, *supra*.

[93] *See* note 49, *supra*, and accompanying text.

[94] 47 U.S.C. §§221(c), 410(c).

[95] 47 U.S.C. §221(c)(emphasis added).

[96] *Inside Wiring Accounting Order*, 5 FCC Rcd at 3524, para. 25.

[97] 47 U.S.C. §410(c).

[98] *Inside Wiring Accounting Order*, 5 FCC Rcd at 3524, para. 25.

[99] *See* Mid-Plains Telephone Co., 5 FCC Rcd 7050, 7056, n.62 (1990), *petition for review pending sub nom.* Crockett Telephone Co. v. FCC, Case No. 90-1604 (D.C. Cir. filed Dec. 20, 1990)(Section 410(c) does not require the convening of a Joint Board to consider jurisdictional separations procedures for average schedule companies).

[100] *NARUC v. FCC*, 880 F.2d at 429 (emphasis added).

[101] *California v. FCC*, 905 F.2d at 1239-45; NARUC v. FCC, 880 F.2d at 427-31.

[102] *Hawaiian Telephone Co. v. PUC*, 827 F.2d at 1275.

[103] We decline to refer this issue to a discretionary Joint Board, as some parties suggest, because referral would delay resolution of this federal accounting issue.

[104] Automated Reporting Requirements for Certain Class A and Tier I Telephone Companies (Parts 31, 43, 67 and 69 of the FCC's Rules), 2 FCC Rcd 5770 (1987)(*ARMIS Order*), *recon.*, 3 FCC Rcd 6375 (1988); *Joint Cost Order*, 2 FCC Rcd at 1298.

[105] For instance, our Common Carrier Bureau has issued over thirty orders reviewing the cost allocation manuals carriers use to apportion their costs and revenues between regulated and nonregulated activities. Many of these orders are quite detailed. *See, e.g.*, Nevada Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs and Pacific Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 287 (Com.Car.Bur. 1988) (*Nevada and Pacific Order*).

[106] We recently strengthened this system, while retaining the nonregulated classification for enhanced services. Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, Report and Order, CC Docket No. 90-623 (adopted November 21, 1991)(*Computer III Remand Order*).

[107] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, Notice of Proposed Rule Making, CC Docket No. 86-111, 104 FCC 2d 59, 65 (1986). NARUC has acknowledged deficiencies in the jurisdictional separations process. Resolution Concerning a Comprehensive Review of the Part 36 Separations Rules, NARUC Bulletin No. 32-1990, 4-5 (Aug. 6, 1990).

[108] For example, Pacific Bell's cost allocation manual lists 43 separate cost categories for general support facilities investment that our rules aggregate into a single separations category. *Compare* Pacific Bell Cost Allocation Manual, at 8-17 to 8-29 *with* 47 C.F.R. §36.111.

[109] *Joint Cost Order*, 2 FCC Rcd at 1330, para. 256. We recently strengthened this independent auditor requirement. *Computer III Remand Order*, *supra*.

[110] Contrary to Pacific's position, *see* para. 34, *supra*, we decline to defer the accounting classification issue while we obtain comments on the accounting ramifications of our Order redefining the demarcation point. That Order raises no matter that would affect our choice of a permanent accounting classification for inside wiring. If an additional proceeding is required to address accounting matters arising from that Order, we will institute it.

[111] BellSouth Comments at 2-4.

[112] USTA Reply at 3.

[113] NATA Reply at 1-3.

[114] We note the Common Carrier Bureau has held that trouble determination, no access, and no trouble found costs should be allocated between regulated and nonregulated activities, regardless of how the state classifies those costs for intrastate purposes. *See, e.g.*, 1989 Access Tariff Order, 4 FCC Rcd 3638, 3643-47, paras. 66-71 (1989), *applications for review pending*.

[115] 44 U.S.C. §3501-20.

[116] *See* note 3, *supra*.

[117] *See Second Further Notice*, 5 FCC Rcd at 3408, para. 12; *Further Reconsideration Order*, 3 FCC Rcd at 1720, para. 11; *Joint Cost Order*, 2 FCC Rcd at 1310, paras. 88-91.

[118] *Second Further Notice*, 5 FCC Rcd at 3412, n.34.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Classification of Inside Wiring
Services for Accounting Purposes

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: November 21, 1991; Released: February 14, 1992

By the Commission:

I. INTRODUCTION

1. In *RAO Letter 14*,[1] the Accounting and Audits Division of the Common Carrier Bureau determined that all carriers subject to our joint cost rules should continue to classify their inside wiring services as nonregulated activities for federal accounting purposes pending Commission action on remand of *NARUC v. FCC*.[2] We affirmed that determination in the *Inside Wiring Accounting Order*.[3] The People of the State of California and the Public Utilities Commission of the State of California (collectively, California) filed a petition for reconsideration of that Order. Six parties commented on California's petition, and two parties replied.[4]

2. In its petition for reconsideration, California argues that the Communications Act of 1934 and judicial precedent mandate that we rescind *RAO Letter 14* and apply jurisdictional separations procedures to inside wiring costs and revenues. California's arguments are similar to those California raised in response to our proposal in the *Second Further Notice of Proposed Rule Making* in CC Docket No. 79-105[5] to continue the nonregulated classification for federal accounting purposes on a permanent basis.

3. We have considered California's arguments as well as the other arguments raised in this proceeding in our deliberations on the permanent accounting classification.[6] After considering those arguments, we continued the nonregulated classification on a permanent basis for federal accounting purposes. We determined that continuation of that classification will not infringe upon state authority, will be consistent with the Communications Act and with judicial precedent, and will be cost-effective.[7] These determinations apply with equal or greater force to our choice of an interim accounting classification.

4. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 405(a), that the Petition for Reconsideration filed by the People of the State of California and the Public Utilities Commission of the State of California IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Responsible Accounting Officers Letter 14, Classification of Inside Wiring Services for Accounting Purposes, 4 FCC Rcd 7110 (Com. Car. Bureau 1989)(*RAO Letter 14*), *review denied*, 5 FCC Rcd 3521 (1990)(*Inside Wiring Accounting Order*).

[2] National Association of Regulatory Utility Commissioners v. FCC, 880 F.2d 422 (D.C. Cir. 1989)(*NARUC v. FCC*).

[3] Classification of Inside Wiring Services for Accounting Purposes, 5 FCC Rcd 3521 (1990)(*Inside Wiring Accounting Order*), *denying review, RAO Letter 14, supra*.

[4] The commenters are the Ameritech Operating Companies, the Bell Atlantic Telephone Companies, the Public Service Commission of the District of Columbia, the Maine Public Utilities Commission, New England Telephone and Telegraph Company and New York Telephone Company, and the United States Telephone Association. California and the National Association of Regulatory Utility Commissioners filed replies.

[5] Detariffing the Installation and Maintenance of Inside Wiring, Second Further Notice of Proposed Rule Making, 5 FCC Rcd 3407 (1990).

[6] *See* Detariffing the Installation and Maintenance of Inside Wiring, Third Report and Order, FCC 91-386, slip op. at 19, n.91 (adopted November 21, 1991).

[7] *Id.* at 17-19, paras. 36-41.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-503

In re Applications of

ON THE BEACH BROADCASTING	File No. BPH-850712UP
JAMES HARDEN AND CLAUDIA HARDEN, A Partnership	File No. BPH-850712VI
PORTOLA BROADCASTING CORPORATION	File No. BPH-850712VJ

For Construction Permit
for New FM Station, Channel 285A,
San Clemente, California

Appearances

Alan G. Moskowitz, Esq., on behalf of On the Beach Broadcasting; *William E. Zimsky, Esq.*, on behalf of Portola Broadcasting Corporation; *Stanley S. Neustadt, Esq.*, on behalf of Mt. Wilson FM Broadcasters; and *Gary P. Schonman, Esq.*, on behalf of the Chief, Mass Media Bureau.

DECISION

Adopted: January 10, 1992; Released: February 13, 1992

By the Review Board: MARINO (Chairman), ESBENSEN and GREENE. Board Member GREENE issuing Concurring Statement.

Board Member ESBENSEN:

1. For over a quarter-century, various petitioners/applicants have attempted to have assigned, and apply for, FM Channel 285A at San Clemente, California. Now before the Review Board is the latest document in this continuing saga: The *Initial Decision* of Administrative Law Judge Joseph P. Gonzalez (ALJ), 6 FCC Rcd 5221 (1991) (I.D.). The I.D. denied the applications of all remaining applicants to this proceeding for failure to meet the provisions of 47 CFR § 73.207 (minimum mileage separation requirements between FM stations), and denied all requests for waiver of this rule. One party, James Harden and Claudia Harden, a Partnership, did not file exceptions to the I.D., and that application will be dismissed herein for failure to prosecute. *See* 47 CFR § 1.276(f). The remaining two applicants, On the Beach Broadcasting (Beach) and Portola Broadcasting Corporation (Portola), as well as the intervenor, Mt. Wilson FM Broadcasters, Inc. (Mt. Wilson) and the Commission's Mass Media Bureau (Bureau), all filed appropriate exceptions and/or comments. Oral argument was heard before the Board on December 13, 1991 (in which only one applicant, Beach, participated). Both the intervenor (Mt. Wilson) and the Bureau urged again at oral argument that the ALJ's I.D. be affirmed.

BACKGROUND

2. More than twenty-five years ago, a petitioner (Hyzen & Dewey Co.), first asked the Commission to amend 47 CFR § 73.202 (FM Table of Assignments) and add FM Channel 285A at San Clemente. In that same Rule Making proceeding, another petitioner (El Camino Broadcasting Co.) requested that an existing assigned channel at Lancaster, California (FM Channel 300) be deleted at that community and allotted instead to San Clemente. *See In re Amendment of Section 73.202, Table of Assignments (San Clemente and Lancaster, Calif., et al.)*, 2 FCC 2d 647 (1966).

3. In electing to reassign FM Channel 300 from Lancaster to San Clemente (rather than assign Channel 285A), the Commission held (*id.*, at 649-650; footnotes omitted):

> The comments in this Rule Making demonstrate that our second alternative for providing FM service to San Clemente, that is by assigning channel 285A to the community, would violate our minimum mileage separation requirements. Our rules require that any channel 285A be separated from channel 286 (KCBA in Los Angeles) by 65 miles. The best site the Hyzen & Dewey Co. (proponents of a 285A assignment) has been able to locate falls short of meeting our separation requirements by 2 miles. The only sites which could meet the minimum required spacings would have to be located within the confines of Camp Pendleton. In recognition of the fact that such sites would not be available for civilian use, Hyzen & Dewey request a waiver of section 73.207, the minimum mileage separation rule. In view of the possibility of providing San Clemente with FM service by an assignment of a channel other than that of 285A, we find it in the public interest to dismiss the request for assignment of channel 285A to San Clemente.
>
> From all of the facts before us, it appears that the only feasible method of providing San Clemente (population 8,527, which is located in Orange County, population 703,925) and its surrounding area with a first local aural service is by assigning channel 300 to the city . . . . Channel 300 is assigned to [Lancaster, California] and has an application pending for its use by Stereo FM, Inc. (BPH-5110). On deletion of channel 300 from Lancaster, the applicant for the channel will be able to amend its application to specify (under the 25-mile rule) channel 249A, presently assigned to Mojave, Calif., and unapplied for. The information provided us in this docket does indicate that San Clemente and its neighboring communities are rapidly expanding and that it has reached the point at which the need for a first local aural service has become vital. In view of this situation, the number of aural services existing in Lancaster, and the availability of channel 249A for use in Lancaster upon the deletion of channel 300 from that community, we con-

sider the proposal of El Camino Broadcasting Co. to be most productive of a fair, efficient, and equitable result.

We note that the intervenor here, Mt. Wilson, also opposed the addition of Channel 285A at San Clemente in this early Rule Making proceeding. *See* 2 FCC Rcd at 649 n.3.

4. For some eighteen years, interest in assigning channel 285A at San Clemente apparently waned. However, in response to a new petition (filed by Sunbelt Television, Inc.), the Commission, by *Report and Order*, MM Docket No. 84-442, 50 Fed. Reg. 8226 (1985), allotted channel 285A to San Clemente, specifying a site restriction of 8.9 kilometers southeast of that community to protect spacing requirements to KDES (FM), Palm Springs, California, and KCBQ (FM), San Diego, California. The Bureau affirmed this action by *Memorandum Opinion and Order*, Mimeo No. 6281, released August 13, 1986. Mt. Wilson again opposed addition of Channel 285A and filed an application for review of these actions. However, this was denied by *Memorandum Opinion and Order*, 2 FCC Rcd 2514 (1987). Mt. Wilson then sought reconsideration; however, that effort resulted in a denial of its petition. In its *Memorandum Opinion and Order*, 3 FCC Rcd 6728 (1988), denying reconsideration the Commission declared (emphases added; footnotes omitted):

> The *Report and Order* in this proceeding, 50 Fed. Reg. 8226, published March 1, 1985, allotted Channel 285A to San Clemente, California, as its second local service. Both Mount Wilson and [another petitioner] filed comments in opposition to this allotment. In their comments, Mount Wilson and Audio House asserted, *inter alia*, that the only sites complying with the minimum spacing requirements were located on Camp Pendleton but due to objections by Camp officials, these sites would not be available for a proposed transmitter site. In the *Report and Order*, the Mass Media Bureau determined that there was a reasonable likelihood that Camp Pendleton would be available for a transmitter site based on the statement of a Camp official. On July 12, 1985, twelve applications were filed for the allotment.
>
> In the *Memorandum Opinion and Order*, Mimeo No. 6281, released August 13, 1986, the Bureau affirmed its action. On April 10, 1987, we affirmed the Bureau by a *Memorandum Opinion and Order*, [2 FCC Rcd 2514], denying applications for review filed by Mount Wilson and Audio House. In that action, we also noted that Camp Pendleton had subsequently determined that it could not approve the construction of a transmitter tower within its boundaries and that as a result, eleven applicants for the allotment requested waiver of our spacing requirements. One applicant (the Hardens) specified a site outside of the Camp complying with the applicable spacing. In the *Memorandum Opinion and Order*, we determined that a waiver of this applicant of the principal city coverage requirement was justified, and afforded the eleven other applicants an opportunity to amend their applications to specify the same non-short spaced site.

In support of their petitions for reconsideration, Mount Wilson and Eric Chandler contend that the one site referred to in our earlier *Memorandum Opinion and Order* as complying with the spacing requirements is unavailable for such use. Mount Wilson submits an affidavit from land surveyor as well as letters from Naval and Marine Corps officials indicating that the Hardens' site is located on Camp property and would be unavailable for a transmitter site. In this connection, Mount Wilson and Eric Chandler assert that our *Memorandum Opinion and Order* was based on the availability of the site for the Hardens' application. Since the site is unavailable, these parties argue that the allotment should be deleted.

* * *

We do not believe that the latest arguments advanced by Mount Wilson and Eric Chandler require us to delete the San Clemente allotment. Our *Memorandum Opinion and Order* relied on the existence of the Hardens' site, a site which complied with the minimum spacing requirements and which we believed was located outside of Camp Pendleton. For this reason, there was no basis to delete the allotment. Since the Hardens' site is no longer available, it is now necessary for us to consider the allotment in light of the unavailability. For the reasons discussed below, we are affirming the allotment.

At the outset, we would like to emphasize that if we had known or had a reasonable basis to predict prior to the Report and Order that the Camp would not approve a broadcast use of Camp property, we would not have allotted this channel. The underlying requirement for an allotment is the reasonable expectation that a useable site is available complying with the minimum spacing requirements. We will not allot a channel where a properly spaced site is technically infeasible. Although the Commission generally presumes in rule making proceedings that a technically feasible site is available, that presumption is rebuttable. The actual availability of a potential transmitter site complying with the spacing requirements is a matter which can be raised in comments from all interested parties. In the event the issue is raised, we then make a determination on the reasonable likelihood that a site will be available. *Cf. Washington and Wilmington, North Carolina*, 51 RR 2d 1297 (Broadcast Bureau 1982). Such a determination is not obviated by a subsequent event beyond the control of the original proponent or an applicant for the allotment.

The allotment to San Clemente was properly made. At the time of the *Report and Order*, the staff determined that there was a reasonable likelihood that a site on Camp Pendleton would be made available for broadcast use. Mount Wilson and Eric Chandler have not demonstrated that this determination was unreasonable. Indeed, a Camp official specifically stated that there was no longer an outright proscription on civilian uses of Camp property and a broadcast use consistent with existing military uses would be considered. In that context, it was reasonable to

> assume that Camp Pendleton, containing an area of approximately 125,000 acres, could accommodate both military and civilian uses. Thereafter, the applicants for the allotment made proposals to the Camp in good faith and under the reasonable belief that the proposals could be accommodated. *Cf. Pinckneyville, Illinois*, 41 RR 2d 69 (1977). *The fact that Camp Pendleton subsequently determined that it could not accommodate a proposed broadcast use does not negate the reasonableness of the staff's earlier determination or require deletion of the San Clemente allotment.*
>
> We believe it would be inequitable to the applicants for the San Clemente allotment, under the circumstances, to delete an allotment properly made. As a general rule, once good faith applications are filed for an allotment properly made, we believe any noncompliance with our allocation rules should be evaluated in the context of those applications. To do otherwise would foreclose consideration of applications filed in reliance on a proper Commission determination. Such action would be particularly inequitable in this case, since the information relied on to request deletion of the allotment was developed in the application context as a result of the applicant's own good faith efforts.

In response, Mt. Wilson promptly filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit.

5. In *Mt. Wilson FM Broadcasters, Inc. v. FCC*, 884 F.2d 1462, 1466 (D.C. Cir. 1989), the court held that Mt. Wilson's appeal was "not ripe for review at this time," opining that:

> The ultimate test of ripeness requires the appellate court to "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories*, 387 U.S. [136] at 149. This court has framed the test to be: "[I]f the interests of the court and agency in postponing review outweigh the interests of those seeking relief, settled principles of ripeness squarely call for adjudication to be postponed." *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 380 (D.C. Cir. 1986).
>
> The foregoing principles mandate dismissal of this appeal as premature and unripe. The petitioners ultimately seek to prevent another license being granted to a broadcaster in their geographic area. The first tactic available to them was to oppose the allocation of any new channel. If, as here, a channel is nevertheless allocated, they still can oppose before the Commission, as they are now doing, each of the applications for a license (here twelve) on that channel, preserving their objections to the allotment.
>
> At that point, all of the issues which concern both petitioners and potential applicants will be resolved by the Commission. Thereafter, petitioners may, if the Commission's decision is adverse to what they believe are their interests, raise every issue they now raise plus any additional ones they deem relevant, and the reviewing court will be able to "see the concrete effects and implications" of its review and ruling. *American Trucking Ass'ns, Inc. v. ICC*, 747 F.2d 787, 789 (D.C. Cir. 1984). If the Commission denies the pending waiver requests and denies all license applications, petitioners will have no need for an appeal and, given the Commission's broad discretionary authority, there may be no appeal at all. The present appeal simply gives petitioners two possible bites at the same apple.
>
> It may be that, if the Commission declines to waive the minimum distance separation rule or for other reasons declines to grant any current applicant a license, the petitioners may have no basis for an appeal and may face the possibility of other applicants seeking licenses on the allocated channel at later dates. In any future license application proceeding, of course, petitioners may again object before the Commission on all the grounds now available and any others relevant to the new applicants and, if any license is granted, appeal the Commission ruling.
>
> The current appeal simply delays Commission action on the ultimate question in the proceedings, the approval or disapproval of the pending applications for a license. Moreover, it seems obvious that a reviewing court will be in a better position to evaluate the propriety of any Commission action with the totality of that action before it than we are at the present time with only the first-step allotment decision before us.

6. The Court also recounted the following salient facts presented by the petitioners (884 F.2d at 1463-1464):

> Mt. Wilson and Chandler argued that the only site area meeting the separation requirements was within the Camp Pendleton Marine Corps Base. In 1966 the FCC had refused to allot channel 285A to San Clemente because the military base was unavailable for all civilian uses, including transmitting radio signals . . . . The broadcasters argued that circumstances had not changed since then and submitted a supporting affidavit by Saul Levine, the president of Mt. Wilson. He recounted that on May 22, 1984 he talked with a major in the Chief of Staff's Office, as well as a major who served as the head of the base's Communications and Electronics Division. Both men indicated that Camp Pendleton's policy remained unchanged and that no civilian transmitter would be allowed on its property. In addition, Levine said he had visited the site area and that it was "completely devoted to hazardous military training operations."
>
> In response, Sunbelt offered evidence of a change in the policy relating to civilian use. Sunbelt's president reported a conversation with one Dawn Lawson, described only as being "of the Department of Natural Resources, Camp Pendleton," who told him that "certain civilian uses" were allowed, "provided such uses do not interfere with the military functions of the camp." Sunbelt also provided the FCC with a copy of a letter from Colonel A. A. Bernotas, the Assistant Chief of Staff, Facilities. Bernotas adopted the same nebulous position as Ms. Lawson: "In response to your inquiry of 3 July 1984, the Marine Corps does in certain cases permit

civilian use of military property. This is in no way an approval for your proposal to place a transmitter tower on Camp Pendleton. Your proposal would require close evaluation since military use of the land for training purposes takes precedence in all cases." Sunbelt did not identify any alternate transmitter site area but relied solely on the availability of land at Camp Pendleton . . . .

On February 15, 1985 the Chief of the FCC's Policy and Rules Division ordered that the FM Table of Allotments be amended to include channel 285A . . . . As to the transmitter site area, the opinion recognized that the only sites which could meet the minimum spacings would have to be in Camp Pendleton, but apparently in reliance on the Bernotas letter, found that "the Marine Corps indicated its willingness to evaluate the proposal." Petitioners sought reconsideration, but the Policy and Rules Chief affirmed his original decision . . . .

Petitioners then requested the FCC to review its staff's determinations; the Commission affirmed the channel allotment without addressing the siting issue, except to observe that Camp Pendleton had determined that it would *not* approve construction of a transmitter, that eleven out of twelve applicants for a license for channel 285A had requested waivers of the specific requirements, and that one applicant (the James and Claudia Harden partnership) had specified a qualifying site outside the Camp . . . . Mt. Wilson, with the support of Chandler, petitioned for reconsideration. It pointed out that the Harden site was in fact within Camp Pendleton, and that the Camp would not permit a transmitter there. It offered a copy of a letter from the Assistant Chief of Staff, Facilities, evidently Colonel Bernota's successor, referring to the Harden proposal and stating that "such a tower has been determined to be incompatible with the training mission of the base and would not be approved." Thus no properly spaced site for channel 285's transmitter existed, and the FCC could grant a broadcast license only if it waived its separation requirements. The Commission nonetheless denied the petition. Although it acknowledged that the Camp Pendleton transmitter site area apparently was no longer available, it viewed the matter as of the time of the initial staff allotment decision. At that time, it said, there was a "reasonable likelihood that a site on Camp Pendleton would be made available for broadcast use." *In re Amendment of § 73.202 (b) (San Clemente, California)*, 3 F.C.C. Rcd. 6728 (1988). Mt. Wilson and Chandler then filed this petition for review.

7. Shortly thereafter, the Commission released its *Hearing Designation Order* (HDO), 4 FCC Rcd 8399 (1989), in this proceeding, specifying, *inter alia*, the following issues which were ultimately heard by the ALJ (I.D., para. 2):

> (1) To determine whether the proposals of [the captioned applicants] are consistent with the minimum separation requirements of Section 73.207 of the Commission's Rules and, if not, whether cirumstances exist which warrant a waiver of the appropriate rule section.
>
> (2) If a final environmental impact statement is issued with respect to [the applicants] in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 CFR §§1.301-1319.
>
> (3) To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> (4) To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

In the HDO, the Commission also allowed Mt. Wilson to intervene with respect to the "short-spacing" issue (Issue 1) (as well as a previously specified site availability issue, since mooted). *See* 4 FCC Rcd at 8403.

INITIAL DECISION

8. The "environmental" issue (Issue 2) was subsequently deleted by the ALJ with respect to all applicants (I.D., para. 4). The ALJ made full comparative findings and conclusions with respect to all parties, but resolved Issue 1 adversely to all applicants and determined that there was no qualified applicant in this proceeding.

9. More specifically, the ALJ recalled that the addition of Channel 285A at San Clemente would require a site restriction 8.9 kilometers southeast of the community and "that this restriction limited a full-spaced site for the San Clemente facility to a location within the confines of the United States Marine Corps base at Camp Pendleton." (I.D., para 6). However, the ALJ noted that (*id.*, at para. 7; emphasis added):

> The record establishes, *and is not disputed*, that a site for a transmitter on the grounds of U.S. Marine Corps base at Camp Pendleton is not available. Similarly, other less short-spaced locations are not feasible because of a tall ridge lying between such sites and the town of San Clemente, California. Only an extremely tall tower, which is not considered to be economically feasible, could overcome the height of this ridge . . . .

10. Turning to the applicants' proposals, the ALJ observed that (*id.*, at para. 8):

> All of the applicants agree that the best antenna site available is Clemente Peak which is located 61.35 miles from the site of Station KKGO (FM), Los Angeles, California. KKGO (FM) is a grandfathered "super station" operating on Channel 286B, and licensed to Mt. Wilson, the intervenor in this proceeding. Section 73.207 of the Commission's Rules requires a distance separation of 65 miles between a Class A station and a Class B station operating on first adjacent channels. As noted above, the separation between the applicants' proposed transmitter site and station KKGO, Los Angeles is only 61.35 miles. The separation is, therefore, 3.65 miles short of the required 65 miles. The applicant's proposed

transmitter site is, however, fully-spaced to FM stations KDES, Palm Springs, California, and KCBQ, San Diego, California.

11. The ALJ then indicated that (*id.*, at para. 10; emphasis added):

> In order to grant the applicants' request for a waiver of the separation requirements set forth in Section 73.207 of the Commission's Rules, the applicants must demonstrate that *the public interest benefits* flowing from a grant of the requested waiver are sufficiently compelling to offset the magnitude of the spacing deficiency proposed. *Megamedia*, 67 FCC 2d 1527 (1978). The applicants, in attempting to meet this public interest requirement, must demonstrate that there are no suitably fully-spaced or less short spaced sites available. *See Tri-Valley B/casting Co.*, 66 RR 2d 1046 (1989) . . . . After that is established, the party seeking a waiver must demonstrate the extent to which the short-spacing causes interference. The applicants have submitted population figures using the "ratio method" referenced above, and Mt. Wilson supplied population figures using the "contour method." Its engineer concedes, however, that although interference might be expected to occur throughout the overlap area, a desired signal might nevertheless override an undesirable signal by 6 dB (Tr. 468-469). The Bureau indicates its support for the [ratio] method advanced by the applicants.

The ALJ further held that (*id.*, at paras. 12-13; emphasis added):

> As noted above, Portola failed to present any evidence indicating that it sought to locate a fully-spaced site or a site less short-spaced than its present site. On that basis, alone, the Presiding Judge is required to find that Portola has failed to meet its burden of proof for a grant of the requested waiver. The Presiding Judge need not consider any specific evidence regarding interference, *see Tri-Valley B/casting Co.*, 66 RR 2d 1046, 1049 (1989), and Portola's request for grant of a waiver of the requirements of Section 73.207 will be denied.
>
> Beach and Hardens, however, have shown a good faith effort on their part to acquire a fully-spaced or less short-spaced transmitter site. Having shown that no more desirable site is available, they must now demonstrate that the *public interest benefits* which would result from their proposals are sufficiently compelling to offset the magnitude of the spacing deficiency proposed, before a waiver of the Commission's short spacing requirements can be granted. *See Megamedia*, [*supra*].

12. As noted, both the intervenor (Mt. Wilson) and the applicants (jointly) submitted engineering data demonstrating interference that would occur from the operation of any proposed facility on Channel 285A. The applicants collectively posited that interference would occur within the station's protected contour when the "ratio" of the station's signal strength to the unwanted station's strength is less than 6 dBu for first adjacent channels, and they urged the adoption of this so-called "ratio method" for determining the extent to which a listener will be able to hear the desired signal (Tr. 549-550) in this proceeding. The applicants submitted that only the degree of interference in excess of the amount permitted by the Commission (*i.e.*, the amount actually caused by operating from the short spaced site) is pertinent to determining whether a short-spacing waiver is warranted (Joint Engineering Exh. 3, p. 4). Mt. Wilson, however, argued that interference can be expected to occur throughout the entire portion of the station's protected contour which is intersected by the undesired (interference level) contour. It submits, therefore, that interference will occur within the entire area of overlap of KKGO-FM's 54 dBu contour and the proposed San Clemente 48 dBu contour, regardless of the actual ratios of signal strength. It urged adoption of the so-called "contour method," as opposed to the "ratio method," for measuring the degree of interference in this proceeding. *See* I.D., para. 9. As indicated above, the Bureau supported adoption of the "ratio method" to determine interference here.

13. The ALJ found that by employing the "ratio method" favored by the applicants and the Bureau, the short-spacing proposed here would be responsible for causing interference to 3.4 percent of the total population, *or 330,551 persons*, within the protected contour of Station KKGO (FM) (and 3.8 percent, or 430 sq. km., of the area served by KKGO-FM); KKGO (FM) would, in turn, cause interference to 26.4 percent of the population, *or 42,147 persons* (and 14 percent of the area or 81 sq. km.), served by the proposed short-spaced San Clemente stations (Joint Engineering Exh. 3, Table B). Utilizing the "contour method" favored by Mt. Wilson, the ALJ stated that a short-spaced San Clemente station would cause interference to *888,777 persons* within the area served by KKGO (FM), and KKGO (FM) would cause interference to 78.3 percent of the population, *or 124,944 persons* (and 51.4 percent of the area served). I.D., para. 11.[1]

14. Upon consideration of the foregoing, the ALJ held in pertinent part (*id.*, at para. 13; emphasis added):

> In reaching a decision as to whether or not to grant a waiver, the extent of the interference likely to be caused is a factor of decisional significance. In this instance, KKGO (FM), Los Angeles, California would cause interference to 26.4 percent of the population within the San Clemente proposed contour, affecting 42,417 persons and 1.4 percent of the area. These figures arrived at by using the "ratio method" which is endorsed by the applicants and the Bureau, clearly demonstrate that KKGO-FM's operations would have a significant effect on the ability of the San Clemente applicants to provide service to a considerable number of persons living within their proposed service areas. Therefore, if any one of the three competing applications is granted, *under the computation method endorsed by the applicants, more than one quarter of the people living within the service area of the new facility would be unable to adequately hear the radio stations.* The Presiding Judge agrees with the Bureau that this is patently unacceptable; and he further finds that the applicants have otherwise failed to demonstrate any public interest factors to compensate for this significant degree of interference.

EXCEPTIONS

15. In pertinent part, Beach argues that the ALJ erred in holding (I.D., at paras. 10, 13) that "the parties seeking a waiver must [also] demonstrate the extent to which the short-spacing causes interference," and that "the extent of the interference likely to be caused is a factor of decisional significance." Beach claims (but nevertheless concedes) that the ALJ's reliance on any interference data in considering a waiver request is "almost" unprecedented. Beach Exceptions at 14. However, Beach avers that the Commission's "almost off-handed statement" in *Tri-Valley Broadcasting, supra*, pertaining to interference is a "far cry" from a decisionally-significant factor. *Id.*, at 17. For its part, Portola claims that the ALJ erred in (1) rejecting its proposed directional antenna engineering amendment "which would have resolved the short-spacing issue in Portola's favor;" (2) ruling that Portola failed to meet the "threshold tests" to determine whether it qualified for a waiver of 47 CFR § 73.207; and (3) failing to consider "a myriad of public interest considerations." The intervenor, Mt. Wilson, obviously supports the ultimate disqualification of all the applicants in the I.D. However, Mt. Wilson argues that the ALJ erred (1) in failing to consider the *actual* interference to be received by a San Clemente station by the current licensed "superpower" facility of KKGO (FM); (2) in ruling that the "interference ratio method" should be employed in calculating objectionable interference (rather than the "interference overlap" or "contour method"); and, (3) in ruling that the applicants met their burden of establishing that the proposed similar transmitter sites are the "least short-spaced" available sites.

16. In reply to the foregoing exceptions, the Mass Media Bureau argues that (1) the ALJ's denial of the short-spacing waiver requests was correct, and that the amount of predicted interference would be "patently unacceptable"; (2) contrary to Beach's positions, pursuant to *Tri-Valley*, the amount of interference to and from all stations involved should be considered, and that the "public interest" factors alleged by Beach "simply do not outweigh the significance of the amount of objectionable interference presented here;" (3) the ALJ properly rejected Portola's directional antenna amendment because it did not comply with 47 CFR § 73.215(b)(2)(ii); (4) Portola "utterly failed" to make any independent showing regarding the unavailability of lesser short-spaced sites, and thus failed to, at a minimum, satisfy the first two parts of the three-part test for waiver of 47 CFR § 73.207; (5) contrary to Mt. Wilson's claims, the ALJ properly considered the extent of interference caused by KKGO (FM) based upon the maximum facilities; (6) the ALJ properly relied upon the "ratio method" for determining interference; and, (7) the ALJ properly concluded that Beach's proposed site is the "least short-spaced" site available.

DISCUSSION

17. The Commission requires that an applicant seeking a waiver of a Commission rule must make a compelling showing in support of its request. *Stoner Broadcasting System, Inc.*, 49 FCC 2d 1011 (1974). As the court observed in *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), "An applicant for waiver faces a high hurdle even at the starting gate." Further, the Commission has placed particular emphasis on the importance of maintaining the integrity of its FM allocation plan, including strict adherence to the mileage separation requirements. The Commission will deviate from its mileage separation requirements, and grant waivers, only in the most compelling circumstances. *Carroll-Harrison Broadcasting, Inc.*, 67 FCC 2d 254 (1977). When an applicant requests a waiver of the Commission's minimum spacing requirements, it must first make a threshold showing that suitable non-short-spaced sites are not available. *Townsend Broadcasting Corp.*, 62 FCC 2d 511, 512 (1976). Second, the proposed short-spaced site must be found to be the *least* short-spaced site available. *Megamedia*, 67 FCC 2d 1527, 1528 (1978). Third, an applicant must demonstrate that the *public interest benefits* flowing from a grant of the waiver request would be sufficiently compelling to offset the magnitude of the spacing deficiency proposed. *Townsend, supra* at 512; *see also Edens Broadcasting Inc.*, 2 FCC Rcd 689 (Rev. Bd. 1987); *review denied*, 5 FCC Rcd 2576 (1990), *recon. dismissed*, 6 FCC Rcd 4327 (1991). Additionally, the Commission has indicated that evidence of interference is also relevant, pursuant to the "public interest benefits" standard, in determining whether or not to grant a short-spacing waiver request. In *Tri-Valley Broadcasting Co.*, 4 FCC Rcd 4711, 4712 (1989), the Commission declared:[2]

> Nevertheless, in those instances where an applicant seeking waiver of the distance separation requirement has made the necessary threshold showing that no suitable fully spaced or less short-spaced sites are available, we believe that predictions of the protected and interfering contours of the affected stations do provide some measure of the extent of objectionable interference potentially involved and, thus, are useful in making our determination as to whether the public interest benefits are sufficiently compelling to offset the magnitude of the potential interference.

18. Turning to the waiver showing of the two remaining applicants before us, Mt. Wilson argues that neither has made the requisite demonstration under the first two parts of the aforecited *Townsend/Megamedia* three-part test. The ALJ, Beach, and the Bureau agree that Beach's showing in this regard is sufficient. We agree that the record here appears to support Beach's claim that it made multiple contacts throughout the area in and around San Clemente over a period of years in its effort to obtain a fully-spaced site, apparently to no avail. Portola, on the other hand, as found by the ALJ, made no independent search for a fully-spaced site, did not present any evidence in this regard to support its request for waiver of the Commission's short-spacing rules, and merely "joined" in the joint engineering exhibits. *See* para. 11, *supra*. In light of this default, we agree with the ALJ that Portola has not sustained its burden for its waiver request.[3]

19. However, despite their requests for waiver, we also note the concession by the applicants' (joint) engineering consultant that a fully-spaced tall tower could, in fact, be erected to provide service to San Clemente. *See* I.D., para. 7. Perhaps, as claimed, such a tower could be "expensive" (although the exact structure, height, and cost are not revealed), and such an expense may be "prohibitive." So, too, operation from such a tower might not be able to provide precise line-of-sight signal coverage over San Clemente (because of an intervening ridge that the tower

would be designed to overcome). However, these claims are merely speculative, and no evidence is in the record before us from which to make a determination that such a tower could not result in the operation of a fully-spaced facility in full compliance with the Commission's Rules. This lack of evidence does not assist the applicants in meeting their stringent waiver burdens.

20. Nevertheless, the salient consideration in this proceeding is the "public interest benefit" factor, *see Townsend, supra*, and the amount of interference, *see Tri-Valley, supra*, (1) that would degrade KKGO (FM)'s service to a substantial number of persons, and (2) that would be caused in the San Clemente area, and to the population to be served by the San Clemente applicants. It is *undisputed* here that, taking into consideration the absolute best possible scenario for the San Clemente applicants (*i.e.*, utilizing the "ratio method" of calculating interference, *and* engaging in the "legal fiction" of assuming a 50 kW/150 meter KKGO (FM) facility (not its *actual* "superpower" authorized operation)), more than 330,000 persons who currently receive service from KKGO (FM) would be affected, and fully more than 26% of the proposed San Clemente population to be served would not, and could not, receive an interference-free signal.[4] Thus, we agree with the ALJ and the Bureau that the amount of interference, both caused and received, here is "patently unacceptable" under the long-established *Townsend* "public interest benefit" factor, as expanded in *Tri-Valley, supra*. While *Tri-Valley* does appear to be unique with respect to considerations of interference, we here adopt the Bureau's position that reliance on *Tri-Valley*, in conjunction with *Townsend* and *Megamedia*, is the appropriate course of action. And, recalling the Commission's observations in *Memorandum Opinion and Order*, 3 FCC Rcd 6728 ("we . . . emphasize that if we had known . . . that the Camp would not approve a broadcast use . . . we would not have allotted this channel"), we note that now a full record has been developed in this proceeding which clearly indicates that Channel 285A at San Clemente is simply unacceptable.

21. Finally, we also agree with the Bureau that there are not sufficient equitable considerations present here to overcome these interference considerations. Counsel for Beach urged at oral argument that somehow Beach was "suckered" into continuing to prosecute its application in this proceeding (Tr. 615), based upon the various pronouncements of the Commission made during the tortured history of allocating Channel 285A at San Clemente. However, as we have outlined in some detail, *supra*, all applicants were on notice that the establishment of a facility at San Clemente would require overcoming some very high hurdles, indeed. Additionally, (1) the mere presence of a nuclear power plant;[5] (2) the "growth" of the community;[6] (3) the fact that the proposals here offer a *second* aural service to the community;[7] (4) the short-spacing (3.65 miles) is "well within the range that the Commission has heretofore waived;"[8] and (5) the proposed antenna site should be a (*de facto)* antenna farm,[9] are not sufficient to overcome the severe interference considerations,[10] especially with one facility already licensed to San Clemente and the conceded presence of more than 30 other radio signals available in the community (from nearby cities).[11] In consideration of the foregoing, we uphold the ALJ's refusal to waive the provisions of 47 CFR § 73.207 with respect to both remaining applications. As a result, neither applicant is qualified to be a permittee- licensee. Consequently, the Board need not review the exceptions as to the comparative aspects of either remaining applicant.

22. ACCORDINGLY, IT IS ORDERED, That the application of James Harden and Claudia Harden, A Partnership (File No. BPH-850712VI) IS DISMISSED, with prejudice, for failure to prosecute pursuant to 47 CFR § 1.276(f); and,

23. IT IS FURTHER ORDERED, That the Motion for Leave to Amend, filed November 5, 1991 by Portola Broadcasting Corporation IS GRANTED, and the attached amendment IS ACCEPTED; and,

24. IT IS FURTHER ORDERED, That the unopposed Motion Requesting Correction of Transcript, filed December 23, 1991, by Mount Wilson FM Broadcasters, Inc., IS GRANTED, and the transcript IS CORRECTED; and,

25. IT IS FURTHER ORDERED, That the applications of On The Beach Broadcasting (File No. BPH-850712UP), and Portola Broadcasting Corporation (File No. BPH-850712VJ), ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] This calculated interference data is based upon the "legal fiction" that KKGO (FM), as a Zone 1-A (*see* 47 CFR § 73.205(b)), Class B FM facility (*see* 47 CFR § 73.211(b)), must only be considered as producing an effective radiated power of 50 kW from an antenna 150 meters (492 feet) HAAT (Height Above Average Terrain). In actuality, KKGO (FM) is a "grandfathered" "superpower" Class B facility. It was authorized in 1959 to operate at 18 kW, 880 meters HAAT, as a Zone 1-A, Class B station. If KKGO (FM) were authorized pursuant to extant rule provisions, at its present location atop Mt. Wilson, its maximum power would be limited to 0.890 kW. *See* "Engineering Statement" of Susan Crawford at 2. However, three years subsequent to the time KKGO (FM) received authorization, the Commission elected to treat such "grandfathered," "superpower" facilities in a unique manner. In 1962, the Commission amended its method of allocating FM stations, shifting from the contour protection method to that of simple mileage separation. *See In the Matter of Revision of FM Broadcast Rules, First Report and Order*, 40 FCC 662 (1962); *In the Matter of Revision of FM Broadcast Rules, Second Report and Order*, 40 FCC 720 (1962). There, in revising its FM allocation scheme, the Commission considered several alternatives regarding existing "superpower" facilities. One option was to allow these "superpower" facilities to continue to operate at "superpower" levels and to protect them according to their existing facilities, even though such protection would be greater than that afforded to stations in their same class. A second option considered was to downgrade these facilities, reducing antenna height and/or power. The Commission ultimately elected to "grandfather" these "superpower" facilities at their existing authorizations; however, they would only be protected in the future as if they were operating at the maximum facilities allowed for their particular class. *See* 40 FCC at 695-696.

The Board is aware that Mt. Wilson made an "offer of proof" at hearing (*see* Tr. 455) which purportedly demonstrated that the *actual* interference (resulting from KKGO (FM)'s authorized facility) to the San Clemente proposals, in reality, includes 76% of the area within their desired contour.

[2] In *Tri-Valley*, the applicant provided evidence that no fully-spaced, or less short-spaced, sites were available, and the Commission granted waiver of 47 CFR § 73.207. However, there the applicant had been issued a construction permit prior to the time it lost its site, and the applicant was providing *first service* to the community (where there was a nearby nuclear power plant). Additionally, the Commission enumerated the following mitigating factors and specific conditions for the grant (4 FCC Rcd at 4712):

> In the instant case, the area predicted to receive interference by WXLO's own calculations is minimal, representing less than .3% of the area within WXLO's protected contour. Furthermore, the terrain is so mountainous that it is not likely that the affected area receives a satisfactory signal from WXLO notwithstanding the location of WYRY's transmitter. Thus we do not believe that the magnitude of the potential interference involved here outweighs the distinct public benefits resulting from WYRY's operation. Nevertheless, if WYRY receives any complaints of actual interference within the area of predicted overlap, WYRY will be responsible for resolving those complaints.

[3] On January 8, 1990, Portola filed a Motion for Leave to Amend to specify a directional antenna in an effort to resolve the short-spacing issue in its favor. The Motion was subsequently rejected by the ALJ by *Order*, FCC 90M-844, released April 18,1990. We agree with the Bureau (and the ALJ) that Portola's failure to comply with the provisions of 47 CFR § 73.215(b)(2)(ii) in calculating predicted contours rendered its amendment technically flawed and incapable of grant. With respect to Portola's failure to search for a fully-spaced site, Portola claims it was not obligated to do so and relied solely on the Commission's statement in *Memorandum Opinion and Order*, 3 FCC Rcd 6728 (1988) (*see* para. 4, *supra)* that no fully-spaced sites appeared to be available. This, of course, is belied by Portola's own (joint) engineering consultant (*see* para. 19, *infra)*; and, as the Bureau appropriately observes (Reply at para. 18): "In this regard, Portola essentially insists that it is better to ride on the coattails of other applicants who have tried in good faith to locate a lesser short-spaced site rather than to try on its own. The flaw in this is that had Portola tried to locate a lesser short-spaced site, it *may* have been successful. But it did not even try, and its failure to do so is fatal to its request for a waiver. *See Edens Broadcasting, Inc.*, 2 FCC Rcd 689 (Rev. Bd. 1987)".

[4] Beach claims (Exceptions at 19-20; footnotes omitted) that the "minimal interference involved in *Tri-Valley* " should not be elevated to a factor of decisional significance here; nevertheless Beach concedes that consideration of interference is "one factor, [but] a minor one . . ., " and further argues (*id.*):

> Consequently, the Presiding Judge's reliance upon the fact that KKGO-FM would cause interference to 26.4% of the population within the San Clemente proposed contour is, in the annals of Commission short-spacing precedent, *sui generis* : There is nothing to compare it to as the Commission has never even considered the amount of interference within the short-spacing station's contour that would result from the short-spacing. The Commission has absolutely no idea how much interference was predicted in either the short-spaced station's protected contour or to the short-spacing station's contour in *Megamedia*, 67 FCC 2d 527, 42 RR 2d 208 (1978) (new 8 mile short-spacing created); *Beasley Broadcasting of Philadelphia, Inc. (WXTU)*, 100 FCC 2d 106 (1985) (new short-spacings of 7.6 miles and 1.7 miles created); *University of Massachusetts*, 42 RR 2d 216 (1968) (new short-spacings of 2 and 3 miles were created); *Radio Station WKDO*, 37 RR 2d 1485 (Broadcast Bureau 1976) (two new short-spacings were created); or in *Bristol Broadcasting Co.*, 61 FCC 2d 13, 38 RR 2d 625 (1976) (a new short-spacing of 3 miles was created.) Consequently, the Presiding Judge's determination that the extent of interference is "patently unacceptable" is made in a vacuum not based on any precedent or in comparision to any other short-spacing situations.

While Beach is correct in asserting that interference, *per se*, was not a determinative factor in the cases it has relied upon, clear "public interest benefit" factors *were* considered. For example, in *Megamedia* an existing station that could not meet electromagnetic radiation standards created a possible health hazard and was allowed to move to eliminate potential health hazard problems. In *Beasley*, an existing facility desired to improve its coverage area because "city grade" service was provided to only 48% of the community of license, and line-of-sight service was available to only 6.8% of Philadelphia's land area. Thus, a waiver was granted in consideration of improved service to the community of license; the new site was a *de facto* antenna farm (and use of antenna farms benefits both air navigation and broadcasting); the applicant promised to provide equivalent protection to other stations; and the applicant promised to resolve interference problems that did in fact arise. The Commission declared (100 FCC 2d at 109):

> [This] ensures no real harm to those stations in the form of newly created interference or diminution of their protected service contours. In the past, we have not deemed the affording of equivalent protection to short-spaced stations enough, by itself, in situations governed by Section 73.207 of the Rules, to justify waiver of our spacing rules. *Florissant Broadcasting Co., Inc.*, 40 RR 2d 428, 430 (1977); *Musicast of the South, Inc.*, 45 RR 2d 1689 (1979). Here, however, we do not rely solely on equivalent protection or any other single factor as justification of the result we have reached. Rather, evaluating all of the factors in play has convinced us that the balance tilts in favor of waiving the separation rules.

Thus, nothing in *Beasley* suggests that the Commission should allow short-spacing for a *new* facility that will cause interference problems for a large number of persons that an applicant has not demonstrated it can resolve. Additionally, *University of Massachusetts* involved a new noncommercial FM station that would be short-spaced 2 miles and 3 miles to two stations, respectively, and would receive prohibited overlap from a third station. There a waiver was granted because the affected commercial stations were themselves short-spaced to each other and were operating with near-maximum facilities. If they were not short-spaced, the applicant's site would have fully met spacing requirements. The Commission found that the proposed station would not create any interference to either of the two stations, and would not restrict their ability to improve their facilities. Also, any proposed changes to the new station that would adversely affect the two stations would be viewed with disfavor

in the future. In *Radio Station WKDO*, short-spacing of 1.04 miles and 2.08 miles to two stations was permitted by the Broadcast Bureau to bring in a *first service*. Finally, in *Bristol Broadcasting Co.*, an existing station was allowed to move to a site 3 miles short-spaced to a second adjacent channel station. If it moved, it would be required to use a directional antenna to protect a co-channel station (with which it was already short spaced), and the directional system would provide more than enough protection for the adjacent channel station. The Commission noted (61 FCC 2d at 14):

> [W]e determined that minimum mileage separation standards offer the best means for achieving an orderly, efficient, and effective development of the commercial FM broadast service. We do not intend to deviate from this policy. However, we do not believe that policy can simply be applied blindly.

[5] Beach and Portola argue that the ALJ gave insufficient weight to the presence of the San Onofre Nuclear Generating Station near San Clemente, which they claim creates a need for an additional local radio station to broadcast emergency information. In *Tri-Valley Broadcasting, supra*, upon which they rely, the Commission waived the spacing requirements because of the proximity of a nuclear power plant. But, in *Tri-Valley*, unlike the situation here, there was no other local broadcast service, *and* the rough terrain in the area limited service from other stations. (Destructive electrical interference was unlikely in *Tri-Valley* because of mountainous terrain, which separated the existing and proposed stations. Nonetheless, the applicant was obliged to resolve any complaints of actual interference. 4 FCC Rcd at 4712 ¶ 9. We note that the applicants here have not suggested that they incur a similar obligation). Also, when asked to waive the spacing requirements to provide a second outlet for emergency information in *FM Channel Assignment at Lake Geneva, Wisconsin*, 11 RR 2d 1605, 1606 (1967), the Commission refused, even though the existing station was a daytime-only AM station.

[6] Beach and Portola also argue that San Clemente needs an additional station because its population has been "growing." But, population growth alone does not justify short-spacing when the area is neither unserved nor underserved. *Cf. Stoner Broadcasting*, 49 FCC 2d at 1012 (increase in population served is not sufficient for change in existing station's transmitter site). Here, "in excess of thirty aural existing services" are received in the San Clemente area, including KWVE (FM), San Clemente. Mt. Wilson Exh. 3, p. 7. Like competitive broadcast service, additional service for a growing population may be in the public interest, but the applicants have not provided any precedent for waiving the Commission's "go-no-go" spacing requirements simply because of that factor.

[7] To support their positions that the "public interest" should have been given more weight, Beach and Portola point to the high priority the Commission has placed on providing at least two local FM stations for each community, especially where there is no local AM station, but relies only on *FM Broadcast Rules, Third Report, Memorandum Opinion and Order*, 40 FCC 747 (1963). There, the FCC rejected petitions for reconsideration of the mileage separation standards it had adopted for the Table of FM Assignments, even though lesser distances would have made *first* stations possible in communities without other local service. *Id.* at 755. Providing a first local transmission service, a higher allocation priority, *see FM Broadcasting, Further Notice of Proposed Rule Making*, FCC 62-867, 27 Fed. Reg. 7797, 7797-98 (1962), is not necessarily sufficient justification for short-spacing. *See Pinckneyville, Illinois*, 41 RR 2d 69 (1977); *see also FM Channel Assignment at Lake Geneva, Wisconsin*, 10 RR 2d 1755, 1756 (1967) (waiver not granted to provide first full-time transmission service to community where community was served by a day-time AM station and other stations could be received there), *recon. denied*, 11 RR 2d 1605. Although competitive broadcast service is in the public interest and has served as a reason for adding fully-spaced channels to the Table of FM Assignments, the applicants have not offered any examples of Commission reliance on a second local transmission service as a basis for waiving the minimum spacing requirements.

[8] Assuming that Beach and Portola have met their burdens under the first two parts of the test, the salient consideration then is the "public interest benefit" factor. *See Townsend, supra*. Beach claims that the ALJ erred when he found that the applicants have "failed to demonstrate any public interest factors to compensate for [the] significant degree of interference" that the applicants' own engineering exhibit predicts KKGO will cause to the San Clemente service area. I.D., para. 13. As noted above, the applicants must demonstrate that the benefits flowing from a waiver are compelling enough to offset the magnitude of the short spacing requested, even if, as they point out, the distance of 3.65 miles involved here is within the range that has been waived in the past. The Commission does recognize that short-spacings of no more than one mile, or 1.6 kilometers, is *de minimis*. In such cases, the threshhold showing of no available fully-spaced site is not required. The Commission may grant a short-spacing waiver even though an applicant failed to make the threshhold showing "provided the applicant has demonstrated that the public interest will be served despite the minor deviation from our spacing rule." *Kenter Broadcasting Co.*, 62 RR 2d 1573, 1577 n. 9 (1986), *aff'd. per judgment sub nom. Kenter v. FCC*, 816 F.2d 8 (1987).

[9] Beach and Portola additionally allege error because the ALJ did not consider their proposed location at a *de facto* antenna farm as a basis for waiver. A mere proposal to use an area determined by the Commission to be an antenna farm, however, does not justify a waiver of the minimum spacing requirements. Other public interest factors must be present. *See Universal Broadcasting of Indiana, Inc.*, 102 FCC 2d 1457, 1460-61 (1986) (citing *WTCN Television, Inc.*, 14 FCC 2d 870 (Rev. Bd. 1968); *Beasley Broadcasting of Philadelphia, Inc. (WXYU)*, 100 FCC 2d 106 (1985)). The Commission emphasized in *Antenna Farm Areas*, 8 FCC 2d 559, 566 (1967), that:

> [T]he establishment of antenna farms . . . does not mean that the Commission will approve mileage shortages to accommodate a particular applicant to locate in such a farm, unless the public interest so indicates. However, if extraordinary reasons of aeronautical safety indicate that a particular antenna structure should be located within the antenna farm, the Commission may authorize a short-spacing to accommodate a particular antenna. Such an action will not be considered as a justification for the filing of other requests for short separations.

Clemente Peak, where the applicants here propose to locate their antennas, has not been recognized as an antenna farm. But, even if the Board were to find that the site is a *de facto* antenna farm, neither applicant has shown that aeronautical safety problems caused its site problems. *See generally, Stoner Broadcasting*, 49 FCC 2d at 1013; *Independent Music*, 39 FCC 2d 1050, 1051 (1973). In addition, they have not proposed "protection from interference equivalent to the protection afforded under the minimum separations" as required by 47 C.F.R. § 73.209(c) for short-spaced antenna farm sites. Both *Mid-Continent Broadcasting Co.*, 45 FCC 1798 (1964), and *Coral Television Corporation*, 49 FCC 2d at 1013, para. 7, on which the

applicants rely, involved aeronautical safety issues for tall television towers, factors not present here. *Beasley* (upon which they also rely), involved an existing station that was trying to improve its inadequate coverage of its community of license from a fully spaced site, but had air hazard and zoning problems. The applicants' proposals to use a short-spaced site already used for other radio transmitters, simply because they have not found a fully spaced site, has no weight in the "public interest benefit" analysis.

[10] Portola also argues for two additional grounds for waiver. It claims that the lack of alternative channels must be considered in the public interest analysis. However, in *Central Connecticut Broadcasting Co.*, 8 RR 2d 460 (1966), on which it relies, the New Britain channel at issue was the only New Britain FM channel, not a second channel as proposed here. The channel had been grandfathered when the Commission adopted its Table of Assignments in 1962, and the application before the Commission proposed facilities identical to those approved for another applicant under the pre-1962 standards (but not built). Portola also argues that the spacing requirement should be waived because its owner/manager is a member of a recognized minority group. In *Por Favor, Inc.*, 42 RR 2d 1667 (1978), on which it also relies, the Commission waived its nighttime coverage requirement pursuant to a daytime AM station's unopposed request. The applicant had an audience for its minority programming and wanted to make its programming available to that audience at night. However, "the Commission has not waived its interference standards even when a combination of minority-ownership and programming is present." *Musicast of the South, Inc.*, 45 RR 2d 1213, 1215 (B/cast Bur. 1979) (rejecting extension of *Por Favor* to short spacing waiver requests). Portola's arguments simply do not justify an abrogation of the Commission's technical spacing standards here.

[11] Although not forming any basis for the Board's resolution of this proceeding, it should be noted that this Class A facility would likely not, under the best of circumstances, produce a listenable signal beyond a 15-mile radius from its antenna. However, by engaging in the "fiction" that predicted interference to and from KKGO (FM) is to be calculated assuming a "standard" KKGO (FM) Class B facility (and not its authorized "superpower" operation), *plus* the utilization of the more-favorable "ratio method" of interference calculation, fully *one-quarter* of the proposed population to be served in the San Clemente area would not receive an interference-free signal. KKGO (FM) would not be required to "downgrade" its facility; thus, in reality, the *actual* interference in the San Clemente area from KGGO (FM)'s operation, at twenty-times the power utilized in the calculations submitted into evidence here, would seemingly result in far more than 26% of the proposed population receiving an interference-degraded signal. Indeed, given the unique mountain and valley terrain in the area, it may be that the actual interference in the San Clemente area could be further exacerbated. As counsel for the Bureau noted at oral argument (Tr. 610): "If you were to draw a line from Los Angeles right down through San Clemente, you would have a virtual valley. If you look behind Los Angeles, on the other side, you've got mountains. The signal from KKGO virtually 'booms' down into San Clemente."

CONCURRING STATEMENT
of
BOARD MEMBER MARJORIE REED GREENE

I agree with my colleagues that none of the applications for the San Clemente FM channel should be granted. The public interest benefits advocated by Beach and Portola simply are not sufficiently compelling to offset the magnitude of the short-spacing.

A great deal of attention has been focused on how the Commission should look at the short-spacing in this case. In distance under the mileage separation standard, it is 3.65 miles, a distance the applicants argue has been waived in the past--when there has been a compelling showing of public interest benefits. Mt. Wilson has emphasized the Commission's language in *Tri-Valley Broadcasting Co.*, 4 FCC Rcd 4711, 4712 (1989), which allowed predictions of the protected and interfering contours as "some measure of the extent of objectional interference potentially involved," and would elevate predicted interference to decisional significance, a position unpopular with Beach. Mt. Wilson would also have the Commission consider *all* interference caused and received by the applicants' proposed station (with KKGO's contour computed on the basis of the fictional maximum facilities allowed under 47 C.F.R. § 73.211(b)), not just the additional predicted interference due to the short-spacing. The Mass Media Bureau, the ALJ, and now the Board agree with this approach. Needless to say, Beach does not. (Portola did not address this issue.)

Under *Tri-Valley* and other precedent cited by the majority, the focus is on the *magnitude* of the short-spacing, not the total impact of the new station. The Commission has emphasized in 47 C.F.R. § 73.209(a) that:

> Permittees and licensees of FM broadcast stations are not protected from any interference which may be caused by the grant of a new station . . . in accordance with the provisions of this subpart.

Under subsection (b), protection against interference is limited to the protection that results from the distance separation requirements and the rules governing maximum power and antenna height in 47 C.F.R. § 73.211.

Although neither Beach nor Mt. Wilson concedes its relevance, the record does include information about the impact of the short-spacing that the parties provided at the Bureau's request. However, because a fully spaced site is not available to the applicants, a comparison of the impact from a single site that would be fully-spaced with the proposed short-spaced site gives unreliable results in this case. Using the ratio method they advocate, the applicants estimated that interference to KKGO from the short-spacing would affect about 128 square kilometers and 27,824 people. Joint Eng. Ex. 3, pages 4, 6. Using the contour method it advocates, Mt. Wilson estimated that interference from the short-spaced site would affect 34,439 *fewer* people and 151 square kilometers *less* than from the fully spaced (but unavailable) railroad site used for the analysis. Revised Supp. to Mt. Wilson Ex. 3, pages 4-5, 9. However, if the analysis had been made using the Camp Pendleton site initially contemplated by the Commission when it allocated the channel to San Clemente, "the results would be different than the results shown here in

that the area and population within the interference area would be less than the area and population from the [short-spaced] site." *Id.*, page 5.

When interference received by the San Clemente stations from KKGO is computed, the results are more consistent. Using the ratio method, the applicants estimated that interference received would affect about 34 square kilometers and 23,649 people more than would be affected from the fully spaced railroad site used in the analysis. This is about 14 percent of the total population. Using the contour method, Mt. Wilson estimated that interference due to short-spacing would affect about 131 square kilometers and about 50,944 people more than interference from the railroad site. Revised Supp. to Mt. Wilson Ex. 3, pages 6. 7, 9. This is about 31.9 percent of the total population. No comparable information is provided from any other fully-spaced site.

While these estimates are relevant because they address the magnitude of the short-spacing, they aren't as helpful as the parties had hoped in illuminating the extent of impact from the short-spacing with respect to the impact on KKGO. What can most comfortably be concluded is that the degree of impact depends on the site chosen for the study and the method used to compute it, and that the impact is likely to be much more significant to the proposed San Clemente station than to KKGO.

Beach would like the Board to disregard the impact received by the San Clemente station. Even if some people won't receive its service because of interference, others will, it argues. But, the precedent is unclear on this point because the Commission has not directly addressed it. In *Tri-Valley* the Commission talked about "the predictions...of contours of the affected stations," which the Bureau and Mt. Wilson interpret to mean that the Commission contemplated showings of interference to and from the affected stations. 4 FCC Rcd at 4712 ¶ 9. In *FM Channel Assignment at Lake Geneva, Wisconsin*, 10 RR 2d at 1756 ¶ 4, the Commission commented that its adoption of separations in its 1963 *Third Report*, "was motivated by the proliferation of grants involving interference, both caused and received." As it explained in the *Third Report*, 40 FCC 2d at 749, "Mileage separations are designed to protect, from interference, a specified area of potential service for each station of a particular class." In other words, protection against interference received from other stations was built into the mileage separations adopted by the Commission and at issue here. *Cf. Catherine J. Porter*, 18 RR 2d 1018, 1019 (1970), in which the Commission rejected a superstation's petition to deny an application for a new station that met the Commission's spacing requirements. There the Commission stated that the petitioner's "earlier having obtained facilities in excess of those currently permitted provides no warrant for providing special treatment." The Commission did comment that "our study of the application [under the old no-interference standard] shows that no 1 mv/m interference would be caused or received."

If interference received by the proposed San Clemente station is relevant in evaluating the short-spacing at issue here, impact approaching the magnitude predicted even under the applicants' ratio method suggests that the proposed station will offer far less efficient service than that expected under the Commission's spacing rule. But, the Board does not have to decide whether received interference can be considered--and decisional--because, looking at the short-spacing as a 3.65-mile shortfall, as urged by Beach, the Board should conclude that the ALJ's result in this case is correct. The short-spacing involved here is not *de minimis*, and unlike the applicant in *Tri-Valley* whose proposed site was separated from the existing station by terrain barriers, the applicants here have not been able to show that the interference from the short-spacing will be minimal. Their showing of public interest benefits is extremely weak and falls far short of the compelling showing required by past Commission precedent. "[T]he Commission has shown some leniency in the application of its mileage spacing rules to existing stations; but the FCC has, with only a few tightly contained exceptions, refused to permit the licensing of new stations that violate the short-spacing rule. This policy flows logically from the choice of the mileage separation method to protect against mutual interference." *North Texas Media, Inc. v. FCC*, 778 F.2d 28, 32 (D.C. Cir. 1985). *Accord, Basic Media, Ltd. v. FCC*, 559 F.2d 830, 834 (D.C. Cir. 1977).

The majority should have focused on the consequences of the short-spacing here, not the full impact of a new station, when concluding that the applicants have not provided a sufficiently compelling basis for waiver of the minimum spacing requirement of 47 C.F.R. § 73.207.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-184

In re Applications of

STEPHEN D. TARKENTON File No. BPH-900417MU

TAYLOR BROADCASTING, LP File No. BPH-900418MJ

SOUTH CENTRAL BROADCASTING COMPANY File No. BPH-900418MK

For Construction Permit for
New FM Station, Channel 223A,
Zebulon, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: February 3, 1992; Released: February 14, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE. Chairman MARINO concurring in the result.

1. Before the Review Board is a pleading styled as an Application for Review, filed September 27, 1991, and supplemented on November 21, 1991, by Design Media, Inc. (DMI), putatively pursuant to Section 1.115 of the Commission's Rules, 47 CFR § 1.115.[1] DMI seeks to overturn *Memorandum Opinion and Order*, FCC 91M-2809, released September 12, 1991, by Administrative Law Judge Edward Luton (ALJ), in which the ALJ: (1) approved a settlement agreement providing for the merger of applicants Stephen D. Tarkenton and South Central Broadcasting Company into a new partnership under the name of Spalding Broadcasting, L.P., in which Tarkenton would be the sole general partner; (2) accepted an amendment of the Tarkenton application reflecting the requisite changes; (3) granted the Spalding application (*i.e.*, the Tarkenton application as amended) for the new FM station at Zebulon, Georgia; (4) dismissed the competing applications of Taylor Broadcasting, LP, and South Central Broadcasting Company; and (5) terminated the proceeding. Oppositions to the appeal and supplement were filed by Tarkenton on October 21, as supplemented October 29, 1991, and December 5, 1991, respectively, and by the Mass Media Bureau on October 21 and December 6, 1991. DMI filed consolidated replies on October 31 and December 16, 1991. For the reasons set forth below, we will dismiss DMI's request.

2. DMI asks that the Board set aside the ALJ's grant of the application of Spalding Broadcasting, L.P., for a new station in Zebulon, Georgia, and that the proceeding be remanded for further hearing as to whether: (1) Spalding's general partner, Stephen Tarkenton, participated in an abuse of the Commission's processes in another Commission proceeding; and (2) whether Stephen Tarkenton's father, Dallas Tarkenton, is an undisclosed party in interest in Zebulon. The Zebulon station will provide city grade service to Griffin, Georgia, and compete with DMI's stations WQUL(FM) and WKEU(AM) in Griffin. In support, DMI alleges:

- Stephen Tarkenton once applied for a new FM station in Lafayette, Florida. A handwriting expert concluded that five signatures on that application were by Dallas Tarkenton, not Stephen.

- Dallas Tarkenton claimed he called all the shots for his son Christopher's application for a new FM station in Hogansville, Georgia, had a power of attorney from Christopher, and was trying to settle that proceeding for a price.[2] The ALJ conducting the Hogansville proceeding directed Dallas to appear for a deposition about his role in Christopher's application. Three days later Christopher filed a motion to dismiss his application.

- With the exception of Stephen Tarkenton's Zebulon application, all applications and ownership reports in the FCC's records for Dallas Tarkenton and his sons list the same mailing address and telephone number for each of the Tarkentons. They are the same as Dallas Tarkenton's Athens, Georgia, residence address and telephone number.

- Dallas Tarkenton is providing financing for Stephen Tarkenton's Zebulon application.

- Amendments to Dallas Tarkenton's Unadilla, Georgia, application and Stephen Tarkenton's Zebulon application and exhibits to Dallas' Blackville, South Carolina, application and Stephen's Zebulon application are virtually identical with respect to letterhead, format, typeface, use of capitalization and terminology.

These allegations are documented with declarations under penalty of perjury or references to Commission records. According to DMI, Dallas Tarkenton's heavy involvement in the applications and stations of each of his sons establishes that Dallas Tarkenton is the undisclosed party in interest in his son Stephen's Zebulon application.

3. Tarkenton opposes the appeal as both untimely and procedurally defective. With respect to the allegations regarding the Lafayette application, Tarkenton argues that the issues raised are wholly immaterial to this proceeding, that Tarkenton's application has been voluntarily dismissed, and even if there had been wrongdoing, that it has no bearing here. Tarkenton also denies the real-party-in-interest allegation, calling it "diatribe . . . based on nothing but speculation and surmise." Opposition to Application for Review, page 7. He responds that the mere financial assistance on the part of Dallas Tarkenton does not prove that his father is the real-party-in-interest in Tarkenton's application or in Spalding. His financing was fully disclosed in Section III of the Zebulon application and reviewed by the Mass Media Bureau before it set the application for hearing. The Bureau did not specify an issue in the designation order. Tarkenton further adverts to Commission precedent that places a heavy burden on those seeking real party issues involving family members. *See generally High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 435 (Rev. Bd. 1983) (subsequent history omitted).

Even independent family relationships may have attributes such as financial ties that in non-familial relationships may be persuasive indicia of real party status. Tarkenton also attaches a statement from his father made under penalty of perjury in which Dallas Tarkenton avers in pertinent part:

> Design Media alleges that I will be the person who is actually in control of the Zebulon application and will control Spalding Broadcasting, L.P and the radio station.
>
> There is absolutely no truth to such an allegation. My only involvement with the application starts, and stops, with my agreement to provide the financial resources to fund the construction and first three months operating expenses for the new station. I have exerted no influence over Stephen in the preparation or prosecution of this application. I will not be involved in the management nor operation of Spalding Broadcasting, L.P., or the radio station.
>
> As his father, I am of course interested and concerned about all his endeavors. This, however, does not give me the ability to conduct Stephen's business affairs and I will not do so.

Tarkenton says he used his father's address for the Lafayette application because he considered that to be his permanent address at a time when he had a succession of temporary addresses. He now lives in Newnan, Georgia, and used that address for the Zebulon application. He asserts that the similarities in the appearance of the amendments he and his father prepared for their separate applications are easily explained, because both he and his father use the same consulting firm to prepare their documents. Documents for many of the firm's clients are similar in appearance. He also asserts that discussion of Christopher Tarkenton's application for Hogansville, Georgia, is far afield of the Zebulon application, does not prove any wrongdoing, and is speculative. Tarkenton claims that he "has maintained full control and authority over his application at all times, there is no indication that he will deviate from such behavior." Opposition, page 11.

4. The Mass Media Bureau also opposes setting aside the settlement agreement, although it does not object on procedural grounds. According to the Bureau, the evidence presented by DMI does not show that Dallas Tarkenton has an ownership interest in Tarkenton's application or that he will be in a position to control operation of the station, the test for determining whether a third party is a real-party-in-interest. The wrongdoing alleged by DMI is not tied to the Zebulon application, and Dallas Tarkenton's alleged statements about the application of another of his sons does not necessarily require a conclusion that he is a real-party-in-interest in the Zebulon application. The provision of financing or assistance in preparing amendments by a father to a son is not uncommon and, given the familial relationship, also does not support a conclusion that the father is a real-party-in-interest in the Zebulon application.

5. DMI supplemented its application for review with recently obtained information suggesting that Dallas Tarkenton might also be in control of stations WMKJ(FM) and WCOH(AM), Newnan, Georgia, licensed to his son Dallas III. Dallas had sold WCOH to his son Dallas III at the end of 1985 and in the assignment application represented that there would be "an arms length separation of control" between Dallas and Dallas III. Dallas III had purchased WMKJ in 1987 from the successor in interest to the company that had bought the station from Dallas in 1984. A February 20, 1991, letter listing WMKJ and WCOH for sale was written on stationery of "The Tarkenton Companies," which listed WCOH on the letterhead and was signed by Dallas Tarkenton. It forbade station visits and instructed that no information about station performance was to be provided without the express authorization of Dallas Tarkenton. DMI also disputes the reliability of Dallas Tarkenton's above-quoted declaration under penalty of perjury by pointing to conflicting declarations filed by Dallas and a media broker in the reconsideration of MM Docket 90-309.

6. Tarkenton opposes the supplement as irrelevant to the Zebulon application and for failing to make a *prima facie* showing that Tarkenton will deviate from exercising exclusive control of the Zebulon application. The Bureau agrees. In reply, DMI argues that the truthfulness and reliability of broadcast licensees is always of significance to the Commission under *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1210 (1986). DMI argues that it has presented a *prima facie* case of lack of character by presenting evidence of Tarkenton's involvement in the apparently fraudulent Lafayette application. DMI admits that none of the facts presented, standing alone, establishes a *prima facie* case showing that Dallas Tarkenton is a real-party-in-interest in Zebulon. However, DMI submits that the weight of all the facts, viewed together, does create a substantial likelihood that Dallas is the real-party-in-interest in the applications of all his sons, including Tarkenton's Zebulon application, which the Commission should resolve before granting Tarkenton's application.

DISCUSSION

7. DMI is searching for a forum for airing allegations of misconduct by Dallas Tarkenton with respect to applications and licenses of his sons. Although these allegations include Stephen Tarkenton, the Board is without authority to consider them in the present posture of this proceeding.[3] The ALJ's *Memorandum Opinion and Order* approved the settlement agreement among the parties, granted Spalding's application, and terminated the proceeding. The Board is authorized to hear appeals from such final rulings, but section 1.302 of the Commission's Rules, 47 CFR § 1.302, authorizes appeals only from parties. *See, e.g., Roxanne Givens*, FCC 92R-4 (Rev. Bd. released Jan. 17, 1992) (non-party has no legal basis for requesting review of a settlement agreement).[4] DMI has not sought to intervene under section 1.223 of the Commission's Rules governing intervention, and it has given no indication that it desires such status. Absent DMI's intervention, the allegations are not properly before us. *See, e.g., Atlantic Radio Communications, Inc.*, FCC 92R-3 (Rev. Bd. released Jan. 17, 1992) (appeal not reached where petitioner's intervention request was denied). See also section 1.229 of the Commission's Rules, 47 CFR § 1.229, which provides that motions to enlarge the issues may be filed "by any party to a hearing" and sets forth

the burden for late-filed motions to enlarge. The Bureau which could seek additional issues has opposed DMI's request on the merits.

8. DMI correctly argues that the Board can review final orders on its own motion. However, there is no indication here that the ALJ committed any errors in reviewing the evidence before him and awarding the construction permit to Spalding, which would provide a legal basis for Board action on its own motion. *See, e.g., WWOR-TV, Inc.*, 6 FCC Rcd 1524 (1991) (Commission, on its own motion, held settlement agreement in abeyance pending further hearings), *recon. dismissed*, 6 FCC Rcd 4878. When the Commission acted in *Garrett, Andrews & Letizia, Inc.*, 88 FCC 2d 620, 623 (1981), which DMI cites, it explicitly noted that the Board's decision before it contained legal errors requiring correction.

9. ACCORDINGLY, IT IS ORDERED, That the Application For Review, filed September 27, 1991, as supplemented on November 21, 1991, by Design Media, Inc., IS DISMISSED.[5]

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

FOOTNOTES

[1] DMI directed its pleading to the Allocations Branch of the Mass Media Bureau and the Adjudication Division of the Office of the General Counsel before finally transmitting it to the Board on October 17, 1991.

[2] DMI petitioned for rule making to upgrade station WQUL by substituting channels in Griffin and Hogansville, Georgia. (MM Docket 90-309). Dallas Tarkenton's son Christopher was an applicant for the affected Hogansville frequency. DMI claims that the admission against interest was made during a conversation initiated by Dallas Tarkenton. During that same call, according to DMI, Dallas sought payment from DMI with the threat that he could block DMI's access to the frequency it needed for the upgrade by filing a counterproposal for using the frequency elsewhere. A counterproposal was filed that successfully resulted in allotment of the channel to Bowdon, Georgia, and DMI claims later-obtained evidence shows a direct link between Dallas Tarkenton and the proponent of the counterproposal.

[3] Because of the serious nature of the allegations pertaining to Dallas M. Tarkenton, the Bureau may wish to consider these matters further. *See Priscilla L. Schwier*, 4 FCC Rcd 2659, 2660 (1989) (Commission does have a responsibility to look for fire "when it is shown a good deal of smoke," quoting *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985)) (subsequent history omitted). *See also Abuses of Commission's Processes By Broadcast Applicants (Dr. Bernard Boozer)*, 65 RR 2d 91 (1988) (widespread nature of alleged misconduct warranted consideration in a single Section 403 investigation rather than in the context of individual proceedings where isolated evidence may arise). DMI is not foreclosed from filing informal objections to grant of a construction permit and later a license to Spalding if Tarkenton continues to be involved or from filing objections to applications filed by Dallas Tarkenton.

[4] Section 1.302 also requires an aggrieved party to file a notice of appeal within 10 days of the release of the ALJ's ruling, but that requirement may be waived for good cause. *See Warren Price Communications, Inc.*, 6 FCC Rcd 575 (Rev. Bd. 1991); *Darrell Spann*, 6 FCC Rcd 5944, 5945 (Rev. Bd. 1991).

[5] In its opposition to the application for review, Tarkenton requested expedited action on the pleading. That request is moot in light of our action here.

CONCURRING STATEMENT
OF
BOARD CHAIRMAN JOSEPH A. MARINO

A broadcaster represented by an experienced communications law firm has filed a pleading which fails to comply with the most basic procedural requirements. For example, the broadcaster has never sought to become a party to this case, a requirement which is mandated by the Communications Act, 47 USC 309, and 405. Recently, the D.C. Circuit Court, sitting *en banc*, affirmed the Commission's dismissal of a belated attempt to intervene in another case after settlement. *See Coalition for the Preseveration of Hispanic Broadcasting v. FCC*, 931 F.2d 73, 76 (D.C. Cir. 1991); *Raveesh K. Kumra*, 6 FCC Rcd 4837 (Rev. Bd. 1991). This spurious "pleading" should have been summarily dismissed, and the serious allegations about the sins of the father and possibly his sons should have been referred to the appropriate Commission official (47 CFR § 0.61(g)) for a thorough investigation before they are repeated in a public document. *See* Justice Frankfurter, *The Government Lawyer*, 18 Fed. Bar J. 24, 30-31 (1958), on the importance of strict adherence to legal technicalities.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-15

In the Matter of

Amendment of Section 73.202(b), RM-7886
Table of Allotments,
FM Broadcast Stations.
(Poipu, Hawaii)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 27, 1992; Released: February 10, 1992

Comment Date: March 30, 1992
Reply Comment Date: April 14, 1992

By the Assistant Chief, Allocations Branch:

1. Lu Ann Uchida Lane ("petitioner") has requested the allotment of Channel 240A to Poipu, Hawaii, as that community's first local broadcast service. Petitioner states her intention to apply for the channel, if allotted.

2. A staff review of the proposal reveals that, according to the 1991 *Rand McNally Commercial Atlas and Marketing Guide*, Poipu is an unincorporated community located in Kaui County. Poipu is listed by the U.S. Census Bureau as a Census Designated Place with a population of 685.

3. We believe the public interest would be served by proposing the allotment of Channel 240A to Poipu, Hawaii, as that community's first local broadcast service. Channel 240A can be allotted to Poipu in compliance with the minimum distance separation requirements without a site restriction.[1] Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Poipu, Hawaii	--	240A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 30, 1992** and reply comments on or before **April 14, 1992** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lu Ann Uchida Lane
3-2600 Kaumualii Hwy
Suite 3039-127
Lihue, Hawaii 96766
(petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates are North Latitude 21-52-35 and West Longitude 159-27-14.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-268

In the Matter of

Amendment of Section 73.202(b),	RM-7790
Table of Allotments,	
FM Broadcast Stations.	
(Fort Kent, Maine)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 4, 1992; Released: February 12, 1992

By the Assistant Chief, Allocations Branch:

1. Pursuant to the Request of the University of Maine System ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 5371 (1991), proposing the allotment of Channel *293C3 to Fort Kent, Maine, and reservation of the channel for noncommercial educational use. Supporting comments were filed by the petitioner reiterating its intention to apply for the channel. Petitioner also filed reply comments.[1] No other comments were received.

2. As stated in the *Notice*, noncommercial educational stations generally operate within the reserved portion of the FM band (Channels 201-220). Exceptions have been made in cases where the channels in the noncommercial educational band are not available because of foreign allocations (Canadian or Mexican) or potential interference to operations on VHF Television Channel 6. In this case, there are no noncommercial educational channels available for use at Fort Kent because of the required protection to Canadian allotments in Quebec and New Brunswick. Furthermore, petitioner noted that although the U.S./Canadian Working Arrangement does not expressly require protection of Channel 6 television stations, Station CHSJ-6, Bon Accord, New Brunswick, has substantial viewership in Fort Kent and is one of only three off-the-air English language signals available in the community.

3. After a review of the comments, we conclude that the reservation of a commercial channel is justified. No party has expressed an interest in the use of the channel as a commercial facility. Channel 293C3 can be allotted to Fort Kent, Maine, in compliance with the Commission's minimum distance separation requirements provided there is a site restriction 2.5 kilometers (1.6 miles) east of the community. [2] Canadian concurrence has been obtained for Channel 293C3 as a negotiated short-spaced allotment with respect to Channel 296C, Station CIBM-FM, Riviere-Du-Loup, Quebec, Canada.

4. We believe the public interest would be served by the allotment of Channel *293C3 to Fort Kent, Maine, since it would provide the community with its first noncommercial educational FM channel. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 30, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Fort Kent, Maine	*293C3

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] In its reply comments, petitioner requests that its application for Channel 203 at Fort Kent (BPED-891215MC) be amended to specify operation on Channel *293C3 without loss of cut-off protection. Petitioner's request, made for the first time in reply comments, is untimely. Modification of petitioner's application at this stage in the proceeding would foreclose other parties from applying for the allotment without specifically notifying those parties of this possibility. Had petitioner made this request in its petition for rule making, we could have proposed modification of the application in the *Notice* and specifically invited expressions of interest for a noncommercial Class C3 channel at Fort Kent. *See, e.g., Copeland, Kansas*, 5 FCC Rcd 7682 (1990). Therefore, petitioner's request is denied.

[2] The coordinates for Channel *293C3 are 47-15-30 and 68-33-30. The site restriction enables Channel *293C3 at Fort Kent to be made as an unlimited short-spaced allotment.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-21

In the Matter of

Amendment of Section 73.202(b), RM-7796
Table of Allotments,
FM Broadcast Stations.
(Cave City and Radcliff, Kentucky,
and Santa Claus, Indiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 4, 1992; Released: February 12, 1992

Comment Date: April 6, 1992
Reply Comment Date: April 21, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by W & B Broadcasting, Inc. ("petitioner"), requesting the substitution of Channel 278C3 for Channel 278A at Radcliff, Kentucky, and the modification of its construction permit (BPH-871110MU) to specify operation on the higher powered channel. Petitioner states that it will apply for the channel, if allotted. In order to accomplish the upgrade at Radcliff, petitioner also requests changes in the reference coordinates for vacant but applied for Channel 279C3 at Cave City, Kentucky,[1] and for vacant but applied for Channel 277A at Santa Claus, Indiana.[2]

2. We believe the public interest could be served by proposing the substitution of Channel 278C3 for Channel 278A at Radcliff, Kentucky, since it could provide a wide coverage area FM service to Radcliff. An engineering analysis has determined that Channel 278C3 can be allotted to Radcliff in compliance with the Commission's minimum distance separation requirements with a site restriction 15.0 kilometers (9.3 miles) west of the community.[3]

3. We seek comment as to whether we should impose the requested site restrictions on the Cave City and Santa Claus channels. Specifically, petitioner proposes a new site restriction for Channel 277A at Santa Claus of 13.6 kilometers (8.5 miles) northwest of the community. The channel was allotted with a site restriction of 7.4 kilometers (4.6 miles) north.[4] We question whether this additional site restriction may render the Santa Claus allotment unusable. As the Commission has stated:

> The underlying requirement for an allotment is the reasonable expectation that a usable site is available which complies with the minimum spacing requirements. We will not allot a channel where a properly spaced site is technically infeasible. Although the Commission generally presumes in rule making proceedings that a technically feasible site is available, that presumption is rebuttable.

Memorandum Opinion and Order (San Clemente, CA), 3 FCC Rcd 6728 (1988). Therefore, we request petitioner to provide reasonable assurance that transmitter sites conforming to the site restriction are available. If petitioner is not able to provide such assurances, we may not grant its proposal. Furthermore, we note that the allotment of Channel 278C3 at Radcliff would be short-spaced to the coordinates specified in the application for Channel 277A at Santa Claus. Therefore, in the event that petitioner's proposal is granted, we will afford the Santa Claus applicant with the opportunity to amend its application accordingly without loss of cut-off protection. We will serve the applicant for Channel 277A at Santa Claus with a copy of this *Notice*.[5]

4. As requested, we also propose to modify the construction permit for Channel 278A at Radcliff, Kentucky, to specify operation on Channel 278C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest for the use of Channel 278C3 at Radcliff or require petitioner to demonstrate the availability of an additional equivalent class channel.

5. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Radcliff, Kentucky	278A	278C3

[1] Channel 279C3 is reserved for Station WHHT(FM), Cave City. A *Report and Order* in MM Docket No. 90-439, 6 FCC Rcd 387 (1991), modified the license for Station WHHT(FM) to operate on Channel 279C3 in lieu of Channel 279A.

[2] Channel 277A was allotted to Santa Claus in a *Report and Order* in MM Docket No. 87-597, 4 FCC Rcd 7776 (1989). T.C. Monte, Inc., is the sole applicant for Channel 277A at Santa Claus (BPH-900108NY).

[3] The coordinates for Channel 278C3 at Radcliff are North Latitude 37-50-34 and West Longitude 86-06-49.

[4] Petitioner proposes to change the reference coordinates for Channel 277A at Santa Claus from North Latitude 38-09-41 and West Longitude 86-58-47 to North Latitude 38-12-50 and West Longitude 87-00-50.

[5] Petitioner also proposes a new site restriction for Channel 279C3 at Cave City of 20.4 kilometers (12.7 miles) southeast of the community, at North Latitude 36-57-34 and West Longitude 86-00-08. The channel was originally allotted to the community with a site restriction of 17.2 kilometers (10.2 miles) south, at North Latitude 36-59-39 and West Longitude 86-01-48. Because the proposed restriction specifies the same site contained in the application filed by Station WHHT(FM), Cave City, for the channel (BPH-910920IB), reasonable assurance is not necessary for the Cave City allotment. We will serve the licensee of Station WHHT(FM) with a copy of this *Notice*.

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **April 6, 1992,** and reply comments on or before **April 21, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jerrold Miller
Miller & Fields, P.C.
P.O. Box 33003
Washington, D.C. 20033
(Attorney for W & B Broadcasting, Inc.)

8. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making* to the licensee of Station WHHT(FM) and the applicant for Channel 277A at Santa Claus, Indiana:

Newberry
Broadcasting, Inc
P.O. Box 457
Glasgow, Kentucky 42141
(Licensee of
Station WHHT(FM))

John F. Garziglia
Pepper & Corazzini
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006
(Attorney for Newberry
Broadcasting, Inc.)

T. C. Monte, Inc.
2500 Cincinnati Common
Center
Cincinnati, Ohio 45202
(BPH-900108NY)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested

parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-22

In the Matter of

Amendment of Section 73.202(b), RM-7898
Table of Allotments,
FM Broadcast Stations.
(Dumas and Marianna, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 4, 1992; Released: February 12, 1992

Comment Date: April 6, 1992
Reply Comment Date: April 21, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Alan W. Eastham and Craig Eastham, d/b/a KXFE-FM ("petitioners"), licensee of Station KXFE(FM), Channel 296A, Dumas, Arkansas, requesting the substitution of Channel 295C3 for Channel 296A at Dumas and modification of its license for Station KXFE(FM) to specify operation on the higher powered channel. Additionally, in order to accommodate the proposal in conformity with the minimum distance separation requirements, petitioners further request the substitution of Channel 287A for vacant Channel 295A at Marianna, Arkansas.[1] Petitioners stated their intention to apply for Channel 295C3, if allotted.

2. A staff analysis has determined that Channel 295C3 can be allotted to Dumas consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules at the petitioner's specified site located 13.9 kilometers (8.6 miles) west of the community,[2] provided that vacant Channel 295A is deleted at Marianna, Arkansas. Channel 287A can be allotted to Marianna with a site restriction 1.2 kilometers (0.7 miles) north[3] of the community to avoid short spacing to Station KCLT(FM), Channel 285A, West Helena, Arkansas.[4]

3. We believe the public interest would be served by consideration of petitioners' proposal since it could provide Dumas with a wide coverage area FM service. Therefore, we shall propose to modify the license for Station KXFE(FM), as requested. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules we will not accept other expressions of interest in the use of Channel 295C3 at Dumas or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Dumas, Arkansas	296A	295C3
Marianna, Arkansas	295A	287A

5. IT IS ORDERED, That the Secretary shall send a copy of this *Notice* to the permittee of Station WMJW(FM), as follows: Carol B. Ingram, P.O. Box 73, Batesville, MS 38606.

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **April 6, 1992,** and reply comments on or before **April 21, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioners' counsel, as follows:

Cary S. Tepper, Esq.
Putbrese, Hunsaker & Ruddy
6800 Fleetwood Road
P.O. Box 539
McLean, VA 22101

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commis-

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[1] The construction permit issued to Ramblin Communications for Channel 295A at Marianna, Arkansas (File No. BPH-910617JZ) was dismissed by letter on October 15, 1991. Therefore, a new filing window will be opened for the channel at Marianna upon termination of this proceeding.

[2] Coordinates for Channel 295C3 at Dumas are 33-55-34 and 91-38-04. The site restriction is required to avoid a short-spacing to the reference coordinates for Channel 294C2, Benton, Arkansas, at 34-42-05 and 92-30-00. Although the Dumas proposal is short spaced to the construction permit issued for Station WMJW(FM), Channel 295A, Cleveland, Mississippi, Station WMJW(FM) was modified effective November 18, 1991, to specify operation on Channel 298C3 and to change its community of license to Rosedale, Mississippi, in MM Docket No. 89-415. *See* 6 FCC Rcd 5583 (1991). We will serve a copy of this *Notice* on Station WMJW(FM). (Coordinates for Channel 298C3 at Rosedale are 33-56-20 and 90-51-10. Coordinates at the site specified in the application of Station WMJW(FM) (File No. BPH-911030IE) at Rosedale are 33-56-58 and 90-51-57.

[3] Coordinates for Channel 287A at Marianna are 34-47-01 and 90-45-59.

[4] Coordinates at the licensed site of Station KCLT(FM) are 34-30-56 and 90-40-13.

sion's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-494

In the Matter of

Amendment of Section 73.202(b),	RM-7473
Table of Allotments,	RM-7571
FM Broadcast Stations.	
(Cottage Grove and Brownsville, Oregon)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 4, 1992; Released: February 12, 1992

By the Assistant Chief, Allocations Branch:

1. At the request of Paul C. Bjornstad ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6351 (1990), proposing the allotment of Channel 273A to Cottage Grove, Oregon, as the community's second local FM transmission service. Comments were filed by the petitioner reiterating his intention to apply for Channel 273A, if allotted to Cottage Grove, and by JJP Broadcasting, Inc. ("JJP"), licensee of Station KQAK(FM), Bend, Oregon.[2] Eads Broadcasting Corp. ("Eads") filed a counterproposal requesting the substitution of Channel 272C1 for Channel 272A at Brownsville, Oregon, and the modification of Station KGAL-FM's construction permit to specify operation on the higher class channel, and the petitioner filed responsive reply comments.[3] Eads also submitted late-filed informal comments to which petitioner responded.[4]

2. Eads, in its late-filed comments, proposes the allotment of Channel 263A to Cottage Grove in lieu of Channel 273A. It states that the channel can be allotted in compliance with the Commission's minimum distance separation and city-grade coverage requirements. Eads states that there are no alternative Class C1 channels available for allotment to Brownsville. In response, petitioner states its willingness to apply for Channel 263A, if allotted to Cottage Grove.

3. We believe the public interest would be served by providing Cottage Grove with its second local FM service since an interest in use of the channel has been expressed, and also by permitting Station KGAL-FM to expand its coverage area at Brownsville. We have confirmed that Channel 263A can be allotted to Cottage Grove, thus obviating the need to comparatively consider the two proposals. Channel 263A can be allotted to Cottage Grove in compliance with the Commission's minimum distance separation requirements with a site restriction of 6 kilometers (3.7 miles) south to avoid a short-spacing to Station KLCC, Channel 209C, Eugene, Oregon. Channel 272C1 can be allotted to Brownsville at the transmitter site specified in Station KGAL-FM's construction permit.[5]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 30, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Cottage Grove, Oregon	263A, 288A
Brownsville, Oregon	272C1

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Eads Broadcasting Corp., for Station KGAL-FM, Brownsville, Oregon, IS MODIFIED to specify operation on Channel 272C1, in lieu of Channel 272A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of

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[1] The community of Brownsville has been added to the caption.

[2] JJP's comments do not discuss the merits of allotting Channel 273A to Cottage Grove. Rather, they concern the status of its counterproposal in MM Docket 89-591 requesting the substitution of Channel 289C1 for Channel 289C2 at Bend, Oregon, and the modification of Station KQAK(FM)'s license accordingly, by allotting Channel 288A in lieu of Channel 288C1 to Cottage Grove. JJP's counterproposal was adopted by *Report and Order* on June 24, 1991. *See* 6 FCC Rcd 4208 (1991). Therefore, its comments need not be discussed.

[3] Public Notice of the counterproposal was given on December 12, 1990, Report No. 1832.

[4] The Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment period. However, in this case, Eads' informal comments suggest an alternate allotment for Cottage Grove, and petitioner's responsive comments express his agreement. Therefore, because these pleadings assist the Commission in its decision making, we will accept the late-filed pleadings.

[5] The coordinates for Channel 263A at Cottage Grove, Oregon, are North Latitude 43-44-45 and West Longitude 123-02-25. The coordinates for Channel 272C1 at Brownsville, Oregon, are 44-26-11 and 122-59-05.

an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Eads Broadcasting Corp., permittee of Station KGAL-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

7. The window period for filing applications for Channel 263A at Cottage Grove, Oregon, will open on **March 31, 1992,** and close on **April 30, 1992.**

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-379

In the Matter of

Amendment of Section 73.202(b),	RM-6618
Table of Allotments,	RM-6793
FM Broadcast Stations	RM-6657
(Atlantic, Audubon,	RM-7159
Fairfield, Hudson,	RM-6670
and Newton, Iowa)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 5, 1992; Released: February 12, 1992

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause* in this proceeding, 4 FCC Rcd 6636 (1989), setting forth four mutually exclusive or inter-related petitions for rule making. Good News Broadcasting filed a counterproposal. Valley Broadcasting, Inc., KCOB/KLVN Inc., Christian Family Radio, Bruce F. Elviny, and Wireless Communications Corporation filed comments. Good News Broadcasting, Wireless Communications Corporation, KILJ, Inc., Christian Family Radio, Bruce F. Elviny, and KCOB/KLVN Inc. filed reply comments. For the reasons discussed below, we are allotting Channel 243C1 to Audubon, Iowa, and Channel 241A to Hudson, Iowa.

BACKGROUND

2. This proceeding began with the filing of four separate petitions for rule making. Wireless Communications Corporation ("Wireless") proposed the allotment of Channel 243C2 to Atlantic, Iowa, as a third local service. This conflicted with the proposal filed by Christian Family Radio ("Christian Family") proposing the allotment of Channel 243C1 to Audubon, Iowa, as a first local service. In a separate vein, KCOB/KLVN, Inc. ("KLVN"), licensee of Station KLVN, Channel 240A, Newton, Iowa, proposed the substitution of Channel 241C2 for Channel 240A at Newton, and modification of its Station KLVN license to specify operation on Channel 241C2.[2] This upgrade conflicted with a proposal filed by Galesburg Broadcasting Company ("Galesburg"), licensee of Station KCMD, Channel 240A, Fairfield, Iowa, proposing the substitution of Channel 240C2 for Channel 240A at Fairfield, and modification of its Station KCMD license to specify operation on Channel 240C2. In order to accommodate this upgrade, it was also necessary for Galesburg to propose the substitution of Channel 241A for Channel 240A at Newton, Iowa, and modification of the Station KLVN license to specify operation on Channel 241A. In the alternative, Galesburg proposed that the coordinates for the Channel 241C2 upgrade at Newton be changed to specify a site 13.3 kilometers west. This would permit upgrades at both Newton and Fairfield.

3. In response to the *Notice of Proposed Rule Making and Order to Show Cause*, Good News Broadcasting submitted a counterproposal proposing the allotment of Channel 241A to Hudson, Iowa, as a first local service.[3] This conflicted with both the proposed Channel 241C2 upgrade at Newton, and the proposed Channel 241A substitution at Newton. KLVN filed comments indicating a willingness to accept the Class C2 upgrade at the site referenced in the *Notice*.

ATLANTIC AND AUDUBON, IOWA

4. We are allotting Channel 243C1 to Audubon, Iowa, as a first local service.[4] In doing so, we are denying the proposal to allot Channel 243C2 to Atlantic, Iowa, which would have been a third local service. These conflicting proposals were comparatively considered under the Commission's guidelines set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). In comparing conflicting proposals, the priorities are as follows:

1) First full-time aural service

2) Second full-time aural service

3) First local service

4) Other public interest matters

(Co-equal weight is given to priorities (2) and (3))

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[1] The community of Hudson, Iowa, has been added to the caption.

[2] We have also received comments and reply comments from Bruce F. Elving pertaining to the proposed Newton upgrade on Channel 241C2. Dr. Elving submits these comments on behalf of a "broker, interested in having the property listed." Specifically, Dr. Elving proposes a Channel 239C1 upgrade at Newton. KLVN has stated that Dr. Elving is neither a principal nor authorized to act on behalf of KLVN. Inasmuch as the upgrade procedure set forth in Section 1.420(g) of the Rules is limited to licensees and permittees, the comments and reply comments submitted by Dr. Elving will not be considered.

[3] Public Notice was given on November 3, 1989. (Report No. 1800).

[4] The reference coordinates for the Channel 243C1 allotment at Audubon, Iowa, are 41-30-04 and 94-42-09. This site is 30.4 kilometers southeast of Audubon. In its comments, Wireless notes that this site is within two miles of an interstate highway, and speculates that the FAA "in all likelihood" will not approve a tower in excess of 500 feet. This argument is totally unsupported. It remains our view that the issue of FAA approval should be considered at the application stage where specific transmitter sites are before the Commission and the FAA. We also note that a 500-foot tower at the reference site would enable a station to provide the requisite 70 dBu service to Audubon.

Inasmuch as the proposed Atlantic allotment would not provide either a first or second full-time aural service, the proposed Audubon allotment was favored under priority 3 as a first local service.[5]

HUDSON, FAIRFIELD, AND NEWTON, IOWA

5. In accordance with the guidelines set forth in the preceding paragraph, we are allotting Channel 241A to Hudson, Iowa, as a first local service.[6] We deny the conflicting Channel 241C2 upgrade at Newton, Iowa. A Channel 241A allotment at Hudson represents a first local service under priority 3, and is favored over the expansion of existing service which would be considered under priority 4.[7] There is nothing in the record in this proceeding to indicate that the Channel 241C2 upgrade at Newton would have provided either a first or second full-time aural service. In addition, it remains our view that a modification to a superior channel does not create as great a public benefit as that of a new primary service. *See Benton, Arkansas*, 2 FCC Rcd 1963 (1987) and 3 FCC Rcd 4840 (1988); *Corinth and Queensbury, New York*, 5 FCC Rcd 3243 (1990). Therefore, in the absence of a first or second full-time aural service by a proposed upgrade, a new primary service would be favored under priority 4 over the expansion of an existing service.

6. We are dismissing the proposal advanced by Galesburg for a Channel 240C2 upgrade at Fairfield, Iowa, and modification of its Station KCMD license to specify operation on Channel 240C2. Galesburg did not file comments or reply comments in this proceeding. As stated in the *Notice*, in the absence of a Channel 241C2 upgrade at Newton, Iowa, the proposed Channel 240C2 upgrade at Fairfield requires the substitution of Channel 241A for Channel 240A at Newton, and modification of the Station KLVN license to specify operation on Channel 241A. In accordance with Commission policy, the *Notice* specifically required Galesburg to state its willingness to reimburse KLVN for its reasonable costs of changing the channel. Galesburg has failed to do so. Moreover, Galesburg has not even stated its continuing interest in the Channel 240C2 as required by the Appendix to the *Notice*. Accordingly, the appropriate action at this juncture is dismissal. As stated earlier, we will not allot a channel in the absence of an assurance that a party will file an application for the allotment. *See Santa Isabel, Puerto Rico*, 51 Fed. Reg. 6119, published February 20, 1986; *Bradford, Vermont*, 3 FCC Rcd 6964 (1987).

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b), and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 30, 1992,** the Table of FM Allotments, Section 73.202(b) of the Rules, IS AMENDED as follows:

Community	Channel No.
Audubon, Iowa	243C1
Hudson, Iowa	241A

8. The window period for filing applications for the Channel 243C1 allotment at Audubon, Iowa, and the Channel 241A allotment at Hudson, Iowa, will open on **March 31, 1992,** and close on **April 30, 1992.**

9. IT IS FURTHER ORDERED, That the aforementioned petition for rule making (RM-6618) filed by Wireless Communications Corporation IS DENIED.

10. IT IS FURTHER ORDERED, That the aforementioned petition for rule making (RM-6670) filed by KCOB/KLVN, Inc. IS DENIED.

11. IT IS FURTHER ORDERED, That the aforementioned petition for rule making (RM-6793) filed by Galesburg Broadcasting Company IS DISMISSED.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[5] In its comments, Wireless notes that either Channel 294A or Channel 294C3 could be allotted to Audubon, thereby enabling the Commission to allot Channel 243C2 to Atlantic. However, no party in this proceeding has expressed an interest in applying for a Class A allotment or a Class C3 allotment. We adhere to the policy of not allotting a channel to a community where there is no assurance that a party will file an application for the allotment. *Cf. Santa Isabel, Puerto Rico*, 51 Fed. Reg. 6119, published February 20, 1986; *See also, Bradford, Vermont*, 3 FCC Rcd 6964 (1987). We continue to believe that allotting channels without such assurances could lead to allotments lying vacant and an attendant waste of spectrum.

[6] The reference coordinates for Channel 241A at Hudson, Iowa, are 42-24-20 and 92-35-30.

[7] In reply comments, KLVN suggests alternate Channel 253A for Hudson, Iowa. However, a Channel 253A allotment at Hudson conflicts with a pending proceeding in MM Docket No. 89-592 proposing the allotment of Channel 253C3 to Cedar Falls, Iowa, as a new local service. Even though the underlying petition for rule making for Channel 253C3 at Cedar Falls was filed prior to the October 23, 1989, comment date in this proceeding, we see no public interest benefit in consolidating these proceedings. The fact remains that an upgrade at Newton would require the denial of either a new wide-area local service at Cedar Falls, or a first local service at Hudson. As discussed above, either of these allotments, as new primary services, would be favored over the upgrade at Newton.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-23

In the Matter of

Amendment of Section 73.202(b), RM-7900
Table of Allotments,
FM Broadcast Stations.
(Hazard, Hyden, and London,
Kentucky)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: February 5, 1992; Released: February 12, 1992

Comment Date: April 6, 1992
Reply Comment Date: April 21, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Ethel Huff ("petitioner"), permittee of Station WYGE(FM), Channel 223A, London, Kentucky, requesting the substitution of Channel 222C3 for Channel 223A at London, and the modification of her construction permit (BPH-880817MH) to specify operation on the higher class channel. In order to accomplish the upgrade at London, petitioner also requests the substitution of Channel 223A for Channel 284A at Hazard, Kentucky, and the modification of Station WJMD(FM)'s license to specify Channel 223A; and the substitution of Channel 284A for Channel 222A at Hyden, Kentucky, and the modification of Station WZQQ(FM)'s license to specify Channel 284A. Petitioner states that she will apply for Channel 222C3 at London, Kentucky, if allotted.

2. We believe the proposal warrants consideration, since the proposed substitution of Channel 222C3 for Channel 223A at London would provide that community with a wide coverage area FM service. In addition, the Class A stations at Hazard and Hyden, Kentucky, will be able to operate at 6 kilowatts. Channel 222C3 can be allotted to London in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction of 10.6 kilometers (6.6 miles) southwest of the community.[1] Channel 223A can be substituted for Channel 284A at Hazard at the licensed site of Station WJMD(FM) with a site restriction 6.7 kilometers (4.2 miles) south. Channel 284A can be substituted for Channel 222A at Hyden at the licensed site of Station WZQQ(FM) with a site restriction 1.2 kilometers (0.8 miles) northwest. [2] We shall also propose to modify the construction permit for Station WYGE(FM), Channel 223A, London, Kentucky, to specify operation on Channel 222C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Whenever an existing licensee or permittee is ordered to change frequencies in order to accommodate a new channel allotment, Commission policy requires the benefitting party to reimburse the affected station for costs incurred therewith. Petitioner stated her willingness to reimburse the licensee of Station WJMD(FM) for the reasonable cost associated with the change in channels at Hazard, Kentucky. Petitioner also state that she has an agreement with the licensee of Station WZQQ(FM) relative to the costs of changing its channel, however, she also states that she would be willing to bear the costs associated with the change in channels at Hyden, Kentucky if that agreement is not implemented. We are herein issuing an *Order to Show Cause* to Hazard Broadcasting Services, licensee of Station WJMD(FM), Channel 284A, Hazard, Kentucky, and Joey L. Dick, licensee of Station WZQQ(FM), Channel 222A, Hyden, Kentucky, to show why their respective licenses should not be modified as proposed.

4. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Hazard, Kentucky	266C, 284A	266C, 223A
Hyden, Kentucky	222A	284A
London, Kentucky	223A, 280A	222C3, 280A

5. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Hazard Broadcasting Services, licensee of Station WJMD(FM), Channel 284A, Hazard, Kentucky, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 223A in lieu of Channel 284A.

6. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Joey L. Dick, licensee of Station WZQQ(FM), Channel 222A, Hyden, Kentucky, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 284A in lieu of Channel 222A.

7. Pursuant to Section 1.87 of the Commission's Rules, Joey L. Dick and Hazard Broadcasting Services may, not later than **April 6, 1992** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Joey L. Dick and Hazard Broadcasting Services to furnish additional information. If Joey L. Dick or Hazard Broadcasting Services raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification

[1] The coordinates for Channel 222C3 at London are North Latitude 37-03-32 and West Longitude 84-10-02.

[2] The coordinates for Channel 223A at Hazard are North Latitude 37-11-36 and West Longitude 83-11-04. The coordinates for Channel 284A at Hyden are North Latitude 37-10-14 and West Longitude 83-22-49.

for hearing. If no written statement is filed by the date referred to above, Joey L. Dick and Hazard Broadcasting Services will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Joey L. Dick P.O. Box 181 Stinnett, KY 40868 (Licensee of Station WZQQ(FM))	Hazard Broadcasting Services P.O. Box 7001 Hazard, KY 41701 (Licensee of Station WJMD(FM))

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **April 6, 1992,** and reply comments on or before **April 21, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

William P. Bernton

2 Mill Lane

Yarmouth Port, MA 02675

(Attorney for petitioner)

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submis-

sions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

COAST TV	**MM DOCKET NO. 84-934** File No. BPCT-840720KG
MISSION BROADCASTING CORPORATION	**MM DOCKET NO. 84-935** File No. BPCT-840723KI
SOLAR TELEVISION, INC.	**MM DOCKET NO. 84-936** File No. BPCT-840723KJ

For Construction Permit for a
New Television Station
Santa Barbara, California

Appearances

Donald E. Ward and *Chester F. Naumowicz*, on behalf of Coast TV; *Robert Lewis Thompson* and *Howard J. Barr*, on behalf of Mission Broadcasting Corporation; *Michael Couzens*, on behalf of Solar Television, Inc.; and *Paulette Laden, Esq.*, on behalf of the Chief, Mass Media Bureau.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: February 4, 1992; Released: February 12, 1992

I. PRELIMINARY STATEMENT

1. By *Memorandum Opinion and Order* released November 16, 1990 (FCC 90R-107), the Review Board remanded this proceeding for further hearing on the following issues:

> 1) To determine whether Solar Television, Inc., is financially qualified to be a Commission licensee; and
>
> 2) To determine whether Solar Television, Inc., falsely certified its financial qualifications, and if so, the effect thereof on its qualifications to be a Commission licensee.

The Review Board concluded that "a serious question has been raised as to whether at the time of the original application filing, Solar's organizational predecessor association (comprised of its three current stockholders) was in a position to make a good faith certification of its financial wherewithal."

II. FINDINGS OF FACT

2. Solar's three principals, acting as an unincorporated association, certified the applicant's financial qualifications in its FCC Form 301 Application, signed by principal Kenneth E. Hinton, in July 1984. Tr. 2678-9. The initial consideration of the financial arrangments for what was to become the Solar application occurred in a series of conversations between Eugene Huguez and Michael Couzens (Solar's FCC counsel) prior to July 18, 1984. Tr. 2819. During those conversations, Couzens advised Huguez that he had another client, Arnold Applebaum, who "might" be willing to provide the financial wherewithal for the construction and initial operation of the station in Santa Barbara. Tr. 2823. Still prior to July 18, 1984, Huguez had conversations with Mr. Kenneth Hinton and with Suzanne Manriquez during which Huguez claims that they discussed the expected costs of construction, staffing and operation. Solar Ex. R-1.

3. On July 18, 1984, Hinton, Manriquez, Huguez and Couzens met. Solar Ex. R-1. It was decided at the meeting that Huguez, Manriquez and Hinton would file an application for the Santa Barbara facility, and that Couzens would be their FCC counsel. Tr. 2613. It was intended that their applicant would assume corporate form but, due to time constraints, the three actually filed as an unincorporated association, d/b/a Mission Broadcast. However, the application noted that the members of the unincorporated association intended to incorporate prior to the B cut-off date.

4. Hinton testified that at the July 18, meeting, the principals developed a cost figure of $2 million for 1) prosecuting the application, 2) constructing the TV station, and 3) operating the station for three months. Tr. 2665. Hinton testified that they developed the total estimate *at that meeting* by going through each of the cost components and discussing the various costs. Tr. 2691-93. Manriquez also said that they developed the total cost figure at the meeting through a review of the various costs. Tr. 2602-3. Huguez testified, however, that the $2 million cost figure was developed *prior* to the July 18th meeting. Tr. 2833. Huguez testified that he did not recall an item-by-item discussion of costs at the meeting. Tr. 2865-6. Manriquez did not recall whether programming costs were discussed. Tr. 2639. Manriquez testified that the total cost estimate was a "minimum" of $1.8 million but it could be $2 million. Tr. 2597-8. Hinton testified that they developed a $2 million cost figure, but that he had told the other two principals at the meeting that it could be done for $1.8 - $1.9 million. Tr. 2665. Hinton testified that, of the total $2 million budget, the group agreed at the meeting on an estimate of $200,000 - $250,000 for prosecution costs. Tr. 2666-7. Huguez testified, however, that the group had estimated that prosecution costs could reach $400,000. Tr. 2870; 2878.

5. At his deposition, Huguez testified that there was "no set understanding" at the time the application was filed as to how Solar would pay its prosecution costs. Tr. 2902-04. Huguez testified in hearing, however, that the group decided at the July 1984 meeting to meet their estimated prosecution costs by the sale of non-voting stock or through loans. Tr. 2871.

6. Manriquez testified that, prior to filing in 1984, the three of them did *not* discuss "the specifics" of how they would meet their prosecution costs. Tr. 2628. She acknowledged that there was no "plan" in 1984. Tr. 2629. At her deposition, Manriquez had testified that her under-

standing in 1984 was that "committed source" Arnold Applebaum had agreed to pay the "total cost", including legal bills. Tr. 2604-5. She changed her testimony at hearing. Tr. 2606-7.

7. According to Hinton, at the time he executed the application in 1984 certifying the group's financial qualifications, Applebaum was the committed source upon whom the group relied to fund the $2 million estimated cost. Hinton had no first hand knowledge at the time of the 1984 financial certification about Applebaum's ability to fund the group's $2 million cost estimate. Tr. 2671. He took no steps to ascertain whether Applebaum had sufficient net liquid assets to do so. Tr. 2672. He is unaware of Huguez or Manriquez having done. Tr. 2672-3. Manriquez confirmed that no such steps were taken. Tr. 2616. Huguez confirmed that none of them had any first hand information about anything having to do with Applebaum. Tr. 2922-23. When Hinton executed the application containing the financial certification, he had not seen any financial information about Applebaum. Tr. 2678-9. Neither had Manriquez. Tr. 2608. Hinton has never met or talked to Applebaum. Tr. 2678.

8. At the July 1984 meeting, Hinton was told by Huguez that Applebaum was the group's source of committed funds. Hinton stated that Solar's attorney Michael Couzens vouched at the meeting for Applebaum's financial ability. Tr. 2670.

9. At the hearing, Hinton testified that he understood Applebaum's commitment in 1984 was to do three possible things for the group: 1) provide his own balance sheet "to help us obtain a bank letter," 2) provide a lease agreement, and 3) provide his own assets if needed. Tr. 2668; 2674-5. At his deposition, Hinton had testified that the group had looked to Applebaum in 1984 *only* to guarantee a future bank loan. Tr. 2690. Hinton explained the discrepancy by stating at the hearing that he now is better able to recall Applebaum's 1984 commitment because of his recent review of the deposition and discussion with Couzens and the two other Solar principals. Tr. 2690. Nevertheless, Hinton testified at the hearing that the group believed in 1984 that it would take a bank to finance this venture. Tr. 2675.

10. At her deposition, Manriquez stated that there was *no* discussion of a bank loan at the July 1984 meeting. Tr. 2633-4. At hearing, she testified that Applebaum was to be the guarantor for a bank loan (Tr. 2615), but she stated that they did not discuss the "specifics" of what Applebaum would get for guaranteeing the loan. Tr. 2632. Although Huguez testified that Applebaum was "initially" the basis of the group's 1984 financial certification (Tr. 2851), "we knew that we wanted to seek out a bank that would be behind us." Tr. 2853. In 1984, none of the Solar's principals sought a bank letter or requested Applebaum to help them get a bank loan. Tr. 2634-5.

11. At the July 1984 meeting, Huguez first mentioned Applebaum as the committed source. Tr. 2866; 2608; 2669. Huguez had been told by attorney Couzens, in telephone discussions before the July 1984 meeting, that Applebaum would be willing to be the group's committed source for purposes of the FCC financial certification. Tr. 2816-7; 2833. Huguez told Manriquez and Hinton prior to the meeting that he had a "committed source." Tr. 2825-6.

12. Couzens became legal counsel before the July 18 meeting. Tr. 2818. Huguez was relying on Couzens to "assist" his group in connection with the financial certification. Tr. 2820. Couzens told Huguez that Applebaum was his client. Tr. 2822; 2843. Prior to the July 1984 meeting, Couzens told Huguez that Applebaum had a manufacturing business and that he had the financial resources to back the group's financial certification. Tr. 2823. Huguez had not previously heard of Applebaum. Tr. 2827. Huguez testified that Couzens told him that Applebaum's manufacturing company was profitable. Tr. 2849. Huguez testified that he knew no details about Applebaum's equipment leasing company. Tr. 2847. No lease terms were ever discussed with respect to a possible equipment lease from Applebaum. Tr. 2635.

13. Huguez testified that the group's 1984 financial certification was based on Applebaum's commitment: 1) to provide assistance in securing a bank loan, 2) to help with Applebaum's leasing firm to secure an equipment lease, and 3) "we were aware that he could finance the construction himself." Tr. 2829-30. Huguez stated that the group was "looking at his net liquid assets to assist us with the bank loan." Tr. 2830. Huguez also stated that Couzens told him that Applebaum would help them get a bank loan "with the use of [Applebaum's] balance sheet." Tr. 2851. Huguez stated his understanding to be that Applebaum's commitment was to assist in a bank loan and to assist with an equipment lease. Tr. 2837-38. He stated: "We were looking towards Mr. Applebaum and of course towards banks as well." Tr. 2838.

14. At first, Huguez testified that the group never relied on Applebaum for $2 million in cash. Tr. 2855. Huguez stated that Applebaum was only being relied on at the time of certification for a sum in the "area" of $1 million in cash. Tr. 2858. He stated that a bank "could have" loaned $1 million. Tr. 2859. The understanding in 1984 was that a bank loan would be limited to $1 million. Tr. 2860. Later on, Huguez testified that the group relied on Applebaum in 1984 for $2 million in cash. Tr. 2919. In 1984, Huguez did not know what the terms of a $2 million loan from Applebaum might be. Tr. 2920-1. It was not discussed. Tr. 2921.

15. Huguez never sent an equipment list to Applebaum. Tr. 2929. He does not know whether, if Applebaum were to lease equipment to Solar, any down payment would be required. Tr. 2930. Huguez had no idea in 1984 of how long the term of an equipment lease with Applebaum might be. Tr. 2930. Solar's equipment list was first prepared in December 1990. Tr. 2930; 2935.

16. Huguez did not attempt to meet with Applebaum prior to the filing of the group's 1984 FCC application. Tr. 2862. Prior to the filing, Huguez neither saw any documentary evidence of Applebaum's financial ability nor did he request any such evidence. Tr. 2861. In short, Huguez undertook no initiative to contact Applebaum to confirm any aspect of the matter or discuss any terms. Tr. 2863.

17. Huguez initially testified at hearing that he did not recall that Couzens told him anything in 1984 about Applebaum's personal financial condition. Tr. 2865. Huguez also initially testified at hearing that Couzens stated to him in 1984 that he (Couzens) had copies of Applebaum's personal financial statements and that Applebaum had sufficient net liquid assets to meet only the balance of Solar's costs *after* Solar obtained an equipment lease. Tr. 2884. Huguez agreed, however, that at his deposition he had testified that he did not recall *any* 1984 "discussions specifically on net liquid assets." Tr. 2887. At his deposition, Huguez said he could not recall if he knew

in 1984 the dollar figure of Applebaum's net liquid assets. Tr. 2894. At his deposition, he testified that Couzens told him that Applebaum's "personal net worth" was sufficient. Tr. 2900. Nevertheless, Huguez subsequently testified at the hearing that he believes that Couzens informed him in 1984 that Applebaum had net liquid assets of $2 million. Tr. 2888.

18. The basis for Solar's 1984 financial certification changed in 1990. Tr. 2616. Solar was advised by Couzens in 1990 to get a new bank letter to "strengthen" its case. Tr. 2621. Couzens stated that he was involved in a fee dispute with Applebaum and thus Solar "sought to develop a source that was close to us in Santa Barbara." Tr. 2688. The backer for the second letter was Susan Majar. Tr. 2622.

19. Following the Review Board's November 1990 remand of this proceeding, Solar filed a petition for leave to amend which seeks to subsitute an entirely new basis for Solar's financial qualifications. As revised, Solar continues to estimate its costs at approximately $2 million. Solar Ex. R-3. Huguez testified that Solar's total cost estimate of $2 million has never changed and that it never has been more than $2 million. Tr. 2906.

20. Huguez wrote a letter on July 9, 1986 to Solar investor Brenda Bell. Mission Ex. R-1. Bell had loaned money to Solar for prosecution costs. Tr. 2908. The letter states that, after it obtains the construction permit, Solar would need to finance construction of this station at around $2.5 million. Mission Ex. R-1. The letter also states that an additional $2 million would be needed to operate the station for twenty four months. Mission Ex. R-1. Huguez testified that $2 million is his budget for certifying to the F.C.C. but, "in the real world, however, $2.5 million dollars may not be unreasonable." Tr. 2954. He testified that he chose to give his investor the realistic cost figure of $2.5 million. Tr. 2957.

21. Hinton testified that Susan Majar is now Solar's committed source. Tr. 2679. There is no provision in Solar's current budget for any consideration to current bank loan guarantor Susan Majar. Tr. 2701; 2640. Hinton believes she will play that role without charge. Tr. 2701. Solar also can rely on Applebaum, if necessary. Tr. 2680. When Solar gets the construction permit, it may still look to Applebaum. Tr. 2681. Hinton testified that the bank is the committed source. Tr. 2687-8. Manriquez testified that Applebaum, Majar and the bank are Solar's "committed sources". Tr. 2627-28.

III. CONCLUSIONS OF LAW

22. In order to prove that its initial financial certification was not false, Solar needed to show that it engaged in serious and reasonable efforts prior to certification to ascertain predictable construction and operation costs. *Northampton Media Associates*, 4 FCC Rcd. 5517 (1989). The contradictory testimony given by the Solar principals undermines any claim that serious and reasonable efforts were made to determine these costs. Mr. Hinton testified that at the pre-filing meeting on July 18, 1984, the principals developed a cost figure of $2 million for prosecuting the application, constructing the station, and operating it for three months. According to Hinton, that estimate was developed *at that meeting* by a consideration of each of the cost components and discussion of the various costs. Ms. Manriquez also claimed that the total cost figure was developed at the meeting following a considered review of the various costs. However, Mr. Huguez testified that the $2 million cost figure was developed *prior* to the July 18th meeting. Huguez could recall no item-by-item discussion of costs at the July 18th meeting. Mr. Hinton testified that of the $2 million budget, the principals agreed at the meeting on an estimate of $200,000 - $250,000 for prosecution costs. Huguez testified, however, that the principals had estimated that prosecution costs could reach $400,000. Thus, Solar's claim that its principals agreed in 1984 on a $2 million total cost budget seems not to be supported by the testimony of the principals themselves.

23. Solar claims that its estimate for construction and initial operating costs has remained at $2 million since its application was filed. However, on July 9, 1986, Mr. Huguez wrote a letter to Brenda Bell, whose "loan investment" had "made it possible for us to get where we are today." Mission Ex. R-1. The document states that construction costs alone are estimated at $2.5 million. Huguez offered this explanation:

> " . . . $2,000,000 was our budget and we are sticking with that and that $2,000,000 for purposes of certifying, we needed to have a dollar figure, which was necessary and we stick by our $2,000,000 figure. In the real world, however, $2.5 [million] may not be unreasonable." Tr. 2954.

Huguez chose to give the Solar investor the more realistic "real world" cost figure of $2.5 million.

24. The evidence warrants the conclusion that Solar did not engage in serious and reasonable efforts to ascertain its total costs prior to certifying its application. The $2 million figure was merely a generalized estimate of what it might cost to build and initially operate a theoretical television station rather than a serious attempt to evolve a cost proposal for a specific television station.

25. Solar also failed to meet its burden of proving that it had "reasonable assurance" when it certified in 1984 of sufficient funds to meet its estimated costs. When Solar filed its application, it had not even decided upon the immediate source of whatever sum it might require for construction and initial operation. Instead, it contemplated various options: it might borrow the entire sum from Arnold Applebaum; it might borrow the money from a bank with Applebaum acting as a gurantor; or it might finance the equipment component of the operation through Applebaum's equipment company. The Solar principals have offered differing contentions as to 1) how they had agred in 1984 to meet estimated prosecution costs; 2) whether the "committed source" (Applebaum) might or might not provide $2 million in cash, or provide some lesser amount; and 3) whether Applebaum's commitment was only to guarantee some unspecified future bank loan.

26. Solar would ultimately be relying on Applebaum to effect whatever choice of financing that it would employ. But Solar had no agreement, either oral or written with Applebaum. Solar has presented nothing more than self-serving uncorroborated assertions that its FCC counsel told the principals in 1984 that one of his clients would be willing to supply the basis for Solar's 1984 financial certification. That was not enough. *Northampton Media Associates, supra*, 4 FCC Rcd. at 5519. Where the proposed lender is not a financial institution, an applicant is

required to ascertain that the lender had the necessary financial resources at the time of certification. None of the Solar principals had known Applebaum or had any first hand knowledge of his financial condition prior to the financial certification. No Solar principal had seen a written commitment from Applebaum or any financial data about him or his business prior to the 1984 financial certification. The Solar principals did not ascertain just how Applebaum might be willing to back their project; they made no inquiry concerning the terms that Applebaum might require in return for that backing. The evidence shows that when Solar certified that the necessary construction and initial operation funds were "on hand or available from committed sources," and that it had "determined that a reasonable assurance exists that all such sources . . . have sufficient net liquid assets to meet these commitments," that certification was false because Solar had, in fact, taken no steps to ascertain the accuracy of the facts to which it certified.

27. Because Solar has been found to have falsely certified its financial qualifications *ab initio*, it is unable to prove that it is presently financially qualified. *Mableton Broadcasting Company, Inc.*, 5 FCC Rcd. 6314, 6326 n.26 (Rev. Bd. 1990); *Opal Chadwell*, 4 FCC Rcd. 1215, 1217 (1989) (validity of an applicant's financial proposal must be established before it may rely on a new proposal).[1] It is concluded that Solar falsely certified its financial qualifications, and that it is presently financially unqualified. Solar is not qualified to be a Commission licensee, and its application will be denied.

Accordingly, IT IS ORDERED THAT unless an appeal from this Supplemental Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion, the application of Solar Television, Inc., IS DENIED.[2]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

FOOTNOTES

[1] Solar's case on its present financial qualifications is contained in its Exhibits R-3 and R-4 and was received in evidence contingent upon Solar being first found to have been financially qualified at the time its application was filed. Since it is clear that Solar was not initially financially qualified, its case on its present financial qualifications is stricken.

[2] In the event exceptions are not filed within thirty (30) days after the release of this Supplemental Initial Decision, and the Commission does not review the case on its own motion, this Supplemental Initial Decision shall become effective fifty (50) days after its release pursuant to Section 1.276 (d) of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-22

In the Matter of

Amendment of Section 43.61 of
the Commission's Rules

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 24, 1991; Released: February 12, 1992

By the Commission:

I. INTRODUCTION

1. This *Report and Order* revises Section 43.61 of our Rules and Regulations that contains requirements for international common carriers' annual traffic and revenue reports.[1] We eliminate obsolete requirements and streamline requirements for pure resellers. We include data for service with Canada, Mexico, and St. Pierre-Miquelon and add two reporting categories for private line service. We restate Section 43.61 in generic terms so that the reporting requirements can be more easily adapted to changes in the international communications industry and direct the Chief of the Common Carrier Bureau to issue, after notice and comment pursuant to 5 U.S.C. §553, a filing manual, to be published in the Federal Register pursuant to 5 U.S.C. §552, containing detailed reporting requirements consistent with this *Report and Order*.

II. BACKGROUND

2. Section 43.61 requires common carriers that provide international communications service to file annual traffic and revenue reports for service between the United States and overseas points. We adopted a *Notice of Proposed Rule Making (Notice)* [2] to modernize Section 43.61 because some parts are obsolete while others are overly detailed, making it difficult for us to respond rapidly to changing industry conditions. We proposed generic reporting requirements to alleviate this situation. We observed that the information would be more useful to us if all carriers submitted consistently defined data for minutes of service in their reports. We proposed adding two more reporting categories for private line service and adopting modified requirements for pure resellers. Finally, we proposed to include service with Canada and Mexico, which are the two largest international communications service markets, and St. Pierre-Miquelon in the carriers' reports. In this *Report and Order*, we are adopting all the proposals set forth in our NPRM.

III. DISCUSSION

3. This *Report and Order* adopts revisions to modernize Section 43.61 by simplifying it, streamlining reporting requirements, eliminating obsolete requirements, and making it easier to modify the reporting requirements in response to changing industry conditions. We also adopt reporting requirements for pure resellers that differ from the data submitted by facility based carriers. Moreover, the time has come to expand the scope of Section 43.61 to include service with the two largest international markets, Canada and Mexico, and also St. Pierre-Miquelon.

4. The response to the *Notice* indicates general agreement with the changes we propose.[3] All parties support our proposal to state the requirements in generic terms, to streamline the reporting requirements, and to eliminate obsolete categories. AT&T supports each proposal and MCI gives its general support to the *Notice*. The Competitive Telecommunications Association and McCaw support the reduction in reporting requirements for international resellers and Americall Systems and First Phone of New England "enthusiastically endorse the Commission's proposal to establish streamlined reporting requirements"[4] for international resellers.

5. We received suggestions to modify some parts of our proposal to revise Section 43.61. McCaw, for example, suggests that the proposed revision is too vague and we should codify the exemption for resellers.[5] Some respondents suggest that carriers owning facilities and also acting as resellers should report resale service separately.[6] One carrier advocates greater disaggregation of telephone service data than is currently reported.[7] Some comments express differing views as to the definition of minutes that should be used for service originating in the United States.[8] Finally, one respondent is concerned that, if substantive changes in the reporting requirements can be accomplished by merely revising a filing manual, then substantial costs may be imposed inadvertently on carriers.[9]

6. Our objective in revising Section 43.61 is to eliminate unnecessary reporting requirements without compromising our ability to monitor developments or respond to changing conditions. The data have been remarkably useful in analyzing a wide range of issues that have arisen over the years but changing conditions have made some requirements outdated and others overly burdensome. With this *Report and Order*, we modernize the requirements, eliminate the collection of unnecessary data, and provide for the continued submission of data that are useful to the Commission.

A. Generic Reporting Requirements

7. We believe the reporting requirements for international communications common carriers need to be stated in generic terms.[10] In proposing this change, we noted that the current Section 43.61 contains a detailed description of traffic and revenue reporting requirements for international carriers. We believe the level of detail hampers our ability to respond in a timely manner to changes in the industry and to collect relevant data from the carriers providing international communications service. Moreover, the rules require both facility based carriers and pure resellers to submit detailed traffic and revenue data.

8. Based on the support in the comments submitted in this proceeding, we believe the revision proposed in our *Notice* is in the public interest. Only McCaw expressed concern stating that the proposed revision is too vague and could result in more burdensome reporting requirements.[11] We conclude that restating Section 43.61 in general terms will result in less burdensome reporting requirements as this *Report and Order* demonstrates. Further, McCaw's argument overlooks a carrier's ability to request a waiver of a requirement it believes is burdensome.[12] Moreover, the imposition of any substantive filing requirements by the Bureau will still be subject to notice and comment as required by 5 U.S.C. §553,[13] and applications for review of requirements adopted by the Bureau may, of course, be filed. *See* 47 U.S.C. §155(c)(4). Another respondent suggests Section 43.61 should state expressly that data be reported on a country-by-country basis to avoid the possibility that carriers submit data on an aggregated basis.[14] We do not believe our proposed revision of Section 43.61 raises this concern because Part 1.790, which we also proposed to revise, states that the reports require point-to-point traffic.[15]

B. Filing Manual and Obsolete Requirements

9. We adopt our proposal to have a filing manual prepared under the direction of the Chief of the Common Carrier Bureau. In order to do this, we shall amend the rules to give the Chief of the Common Carrier Bureau delegated authority to prepare a filing manual. The manual will contain the reporting requirements and other instructions to be used by carriers to compile their annual traffic and revenue reports of international service. The manual shall incorporate the revisions we proposed in our *Notice*, including eliminating reporting requirements that are obsolete or no longer necessary.[16] As noted above, any other substantive changes to be made by the Bureau, either in the initial manual or in subsequent revisions thereto, will be subject to notice and comment. No party objected to developing a filing manual or eliminating obsolete requirements.

C. Scope of Section 43.61

10. We also proposed to require carriers to include information on service with Canada, Mexico, and St. Pierre-Miquelon in their annual reports, noting that Canada and Mexico are the two largest international communications service markets.[17] U.S. carriers are not now required to include information on service with these countries in their reports.

11. Only one respondent commented on the proposal to include service with Canada, Mexico, and St. Pierre-Miquelon and it supported our proposal.[18] Due to the size of these markets and the need to collect accurate information on service with them in order to monitor more closely emerging developments and continuing trends, particularly net settlement payments, traffic and revenue data for service with these points will be included in reports required by Section 43.61.[19]

D. Resale Carriers

12. Section 43.61 currently requires international carriers, including resellers, to file detailed information for the service they provide. Many resellers have requested, and been granted, a partial waiver of the detailed reporting requirements specified in Section 43.61. Due to the potential burden that might be imposed on international resellers by requiring them to submit detailed information on their service, we proposed to modify the reporting requirements and allow pure resellers to file data showing total messages, total minutes, total revenue, and total settlement payments, if any, for each international service they provide.

13. Comments express general support for our proposal to reduce the reporting requirements for pure resellers although one party, while supporting that proposal suggested that a better solution would be to eliminate filing requirements for resellers altogether[20] and others suggested that facility based carriers also acting as resellers should report separate data on the two operations.[21] One party suggested that the streamlined reporting requirements for pure resellers should be written into Section 43.61.[22] We believe the filing manual can state clearly the new reporting requirements of international resale carriers for their annual traffic and revenue reports. We also believe this proposal will substantially reduce the burden on pure resellers without compromising our ability to collect the minimum information we need to monitor this growing segment of the international communications industry.[23] As noted above, the specific requirements will be subject to notice and comment and published in the Federal Register. In contrast, the suggestion to report separate data on facility based and resale operations would greatly increase the cost and complexity of compiling data for a small number of carriers as well as the staff effort in preparing its annual report. We are not persuaded that the additional data are needed.

E. Reporting Units

14. In order to assure consistent reporting of data by all carriers that provide international message telephone service, we proposed that carriers use customer billed information for service originating in the United States. MCI recommends use of settlement data,[24] which more closely measure conversation time, and AT&T, after initially recommending use of billed tariff minutes,[25] does not object to settlement minutes but urges the Commission to select a single standard so all carriers use the same definition of minutes of service in their reports.[26] Another party suggests that carriers submit data for both billed tariff minutes and settlement minutes during a trial period.[27]

15. Information submitted in this proceeding convinces us that settlement minutes, rather than customer billed minutes, are a better measure of telephone service from the United States to other countries.[28] Settlement minutes measure more accurately international telephone use because, as noted by MCI, international rates are denominated in minutes so billed minutes tend to overstate the length of a conversation.[29] Moreover, international settlements are based on conversation time rather than billed time. A change to collecting settlement minute data for U.S. billed service will also make minutes for service billed in the United States more comparable to minutes of service billed in other countries because the latter minutes measure conversation time. Finally, data submitted in this proceeding indicate that the difference between customer billed minutes and settlement minutes is not large so the change from billed minutes to settlement minutes will not result in a substantial departure from data submitted in the past.[30] We, therefore, direct the staff to use

settlement minutes in the filing manual and to define service in terms of "U.S. billed traffic" and "foreign billed traffic."

16. In our *Notice*, we proposed to add two more reporting units for private line and leased channel service, and to require carriers to report their total revenue from new services offered to international communications users, declining to require detailed information on these services. These proposals were supported without objection and they will be incorporated into the new filing manual.

IV. CONCLUSION

17. In this *Report and Order*, we adopt a revision in the reporting requirements for carriers providing international communications service. We adopt a new Section 43.61 that is written in generic terms to replace the detailed version that currently exists and we direct the Chief of the Common Carrier Bureau to issue, after notice and comment, a filing manual with the reporting requirements and other instructions to be used by the carriers to compile their reports. We eliminate obsolete requirements, streamline requirements for pure resale carriers, include service with Canada, Mexico, and St. Pierre-Miquelon within the scope of the section, change the definition of minutes to be reported for service billed in the United States, add two new reporting categories for private line and leased channel service, and require carriers to report total revenue for each new service they introduce.

V. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED THAT pursuant to authority contained in Sections 4(i), 4(j), 219, 220(a), 303(r), 403 and 404 of the Communications Act of 1934, as amended, 47 U.S.C., §§154(i), 154(j), 219, 220(a), 303(r), 403 and 404, that Parts 0, 1 and 43 ARE AMENDED as set forth in Appendix A below.

19. IT IS FURTHER ORDERED THAT the Chief, Common Carrier Bureau is delegated authority to issue and subsequently revise a filing manual for the annual international communications service traffic and revenue reports.

20. IT IS FURTHER ORDERED THAT Section 0.291(h) of the Communications Act of 1934, as amended, 47 U.S.C., §0.291(h) IS AMENDED as set forth in Appendix A.

21. IT IS FURTHER ORDERED THAT this *Report and Order* will be effective **May 1, 1992.**

22. IT IS FURTHER ORDERED THAT this proceeding IS TERMINATED.

23. For further information on this item contact Kenneth B. Stanley, Industry Analysis Division, Common Carrier Bureau, (202) 632-0745.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parts 0, 1 and 43 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 0 Subpart B continues to read as follows:

AUTHORITY: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

2. Part 0.291(h) is revised to read as follows:

§ 0.291 Authority delegated.

* * * * *

(h) **Authority concerning Rule Making and investigatory proceedings.** The Chief, Common Carrier Bureau shall not have authority to issue notices of proposed Rule Making, notices of inquiry or to issue reports or orders arising from either of the foregoing, except that the Chief, Common Carrier Bureau shall have authority to issue and revise a manual on the details of the reporting requirements for international common carriers set forth in §43.61(d) of this title.

* * * * *

3. The authority citation for Part 1 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended, 47 U.S.C. 154, 303, implement 5 U.S.C. 552 unless otherwise noted.

4. Section 1.790 is revised to read as follows:

§ 1.790 Reports relating to traffic by international carriers.

Carriers shall file periodic reports regarding international point-to-point traffic as required by Part 43 of this chapter.

5. The authority citation for Part 43 continues to read as follows:

AUTHORITY: Secs. 4, 48, 48 Stat. 1066, as amended, 47 U.S.C. 154 unless otherwise noted. Interpret or apply Secs. 211, 219, 48 Stat. 1073, 1077, as amended; 47 U.S.C. 211, 219, 220.

6. Part 43.61 and its heading are revised to read as follows:

§43.61 Reports of international telecommunications traffic.

(a) Each common carrier engaged in providing international telecommunications service between the area comprising the continental United States, Alaska, Hawaii, and off-shore U.S. points and any country or point outside that area shall file a report with the Commission not later than July 31 of each year for service actually provided in the preceding calendar year.

(b) The information contained in the reports shall include actual traffic and revenue data for each and every service provided by a common carrier, divided among service billed in the United States, service billed outside the United States, and service transiting the United States.

(c) Each common carrier shall submit a revised report by October 31 identifying and correcting any inaccuracies included in the annual report exceeding five percent of the reported figure.

(d) The information required under this section shall be furnished in conformance with the instructions and reporting requirements prepared under the direction of the Chief, Common Carrier Bureau, prepared and published as a manual.

FOOTNOTES

[1] We also delete the reference to marine telegraph service in Section 1.790 to conform to our elimination of the requirement for reports on marine telegraph service in 1988. *See* Report and Order, 3 FCC Rcd 588 (1988).

[2] Notice of Proposed Rule Making, 6 FCC Rcd 1424 (1991).

[3] We received comments from AT&T, MCI Telecommunications Corporation, the Competitive Telecommunications Association, McCaw Cellular Communications, and a joint filing from Americall Systems of Louisville and First Phone of New England. Reply comments were submitted by AT&T, MCI Telecommunications Corporation, and Gregory C. Staple.

[4] *See* Joint Comments of Americall Systems of Louisville and First Phone of New England, Inc. at 4.

[5] *See* McCaw Cellular Comments at 5.

[6] *See* McCaw Cellular Comments at 6 and AT&T Comments at 5.

[7] *See* MCI Telecommunications Comments at 7.

[8] *See* MCI Telecommunications Comments at 3 and AT&T Comments at 6.

[9] *See* McCaw Cellular Comments at 9.

[10] Other reporting requirements that apply to carriers subject to our jurisdiction are stated in general terms. Section 43.21, which concerns annual financial reports, and Section 43.43, which concerns changes in depreciation rates, for example, do not describe the data to be submitted by carriers in the kind of detailed terms specified in Section 43.61.

[11] *See* McCaw Cellular Communications Comments at 4-5.

[12] We also note that resellers seeking a partial waiver of the detailed reporting requirements have been granted that relief on a routine basis because we are concerned that such requirements might impose an undue burden on them to collect, compile, and report detailed traffic and revenue data.

[13] This will be accomplished through a Public Notice requesting comments on the Bureau's proposed requirements, published in the Federal Register.

[14] *See* Gregory C. Staple Reply Comments at 4.

[15] *See Notice* Appendix A.

[16] These include the circuit traffic (CT) schedule; information on "facsimile, cablephoto, and radiotelephone service"; "photo transmission service"; "addressed press service"; the distinction of leased channel and private line service on the basis of "full period" and "short period"; the distinction of telegraph service on the basis of "full, letter, and press"; the distinction of message telephone service on the basis of "day rate, person, etc."; and total revenue figures for telegraph service, message telephone service, telex service, leased channel service, other telegraph service, and other telephone service.

[17] Data on file with the Commission show that revenue from telephone service between the United States and these two countries was almost $2 billion in 1989. Moreover, net settlement payments to Telmex, the telecommunications administration in Mexico, amounted to $534 million in 1989. We have expressed our concern with the growing balance of payments deficit of the United States in international message telephone service and are addressing several difficult issues related to that problem in another proceeding. *See* Further Notice of Proposed Rule Making, CC Docket No. 90-337, FCC 91-158 (released May 23, 1991).

[18] AT&T Comments at 4.

[19] We believe the submission of data on service with Canada and Mexico supports the international trade efforts of the United States with both these countries by reducing trade barriers that might be caused by imperfect information on communications service flows between the countries.

[20] *See* Competitive Telecommunications Association Comments at 4.

[21] *See* AT&T Comments at 5 and McCaw Cellular Comments at 6.

[22] *See* McCaw Cellular Comments at 5.

[23] The number of international resellers filing traffic and revenue reports increased from 21 in 1988 to 48 in 1990 and their revenue rose from $65.3 million to $166.9 million.

[24] *See* MCI Telecommunications Comments at 5.

[25] *See* AT&T Comments at 6.

[26] *See* AT&T Reply Comments at 3.

[27] *See* Gregory C. Staple Reply Comments at 7. Staple also recommends that carriers be required to file a hard copy of their annual reports in addition to the computerized versions so that the reports are available for public inspection. We agree with this recommendation.

[28] AT&T suggests that the terms "originating traffic", which is intended to indicate service from the United States to other countries, and "terminating traffic", which is intended to indicate service from other countries to the United States, may be misinterpreted and should be replaced by more accurate terms. It recommends "U.S. billed traffic", which includes a U.S. carrier's sent-paid, received-collect and USA Direct-like services, and "foreign billed traffic" are appropriate designations and consistent with the data used for international settlements. *See* AT&T comments at 7.

[29] MCI also urges us to require carriers to submit more detailed data on international telephone service than are now collected. It suggests five reporting categories for telephone service. *See* MCI Comments at 7. Another respondent supports this proposal. *See* Gregory C. Staple Reply Comments at 6. The level of detail that is proposed is not needed to monitor developments in the industry.

[30] AT&T data on telephone service to twenty countries composing approximately sixty percent of its service originating in the United States show that the difference between customer billed and settlement minutes is relatively small and declining for the period 1988-1990. Settlement minutes for service to the twenty countries were, on average, 5.2 percent lower than billed minutes in 1990. The differences in 1988 and 1989 were 5.7 percent and 5.5 percent respectively. *See* letter from R.P. Guirlando, Division Manager, AT&T, to the Commission dated August 9, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-275

In the Matter of

Amendment of Section 73.202(b), RM-7786
Table of Allotments,
FM Broadcast Stations.
(Franklin, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 5, 1992; Released: February 12, 1992

By the Assistant Chief, Allocations Branch:

1. At the request of Franklin Community Broadcasting ("petitioner"), permittee of Station KPXQ(FM), Channel 270A, Franklin, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 5562 (1991), proposing the substitution of Channel 270C3 for Channel 270A at Franklin, and the modification of Station KPXQ(FM)'s construction permit to specify operation on the higher powered channel. Petitioner filed comments stating its intention to apply for channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 270C3 for Channel 270A at Franklin, since it would provide the community with a wide coverage area FM service. Channel 270C3 can be allotted to Franklin in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.5 kilometers (6.5 miles) southeast to accommodate petitioner's desired site.[1] As proposed, we will also modify petitioner's construction permit for Station KPXQ(FM) to specify operation on Channel 270C3 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 30, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Franklin, Texas	270C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Franklin Community Broadcasting for Station KPXQ(FM), Franklin, Texas, IS MODIFIED to specify operation on Channel 270C3, in lieu of Channel 270A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Franklin Community Broadcasting, permittee of Station KPXQ(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 270C3 at Franklin are North Latitude 30-56-34 and West Longitude 96-25-59.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-524

In re Applications of

Willie A. Jefferson d/b/a OPPORTUNITY BROADCASTING OF SHREVEPORT	File No. BPH-870814MK
NTW, INC.	File No. BPH-870820ME
PORT CITY COMMUNICATIONS, L.P.	File No. BPH-870820MH
INNOVATIVE WOMEN'S MEDIA ASSOCIATION	File No. BPH-870820MQ
CADDO BROADCASTING LIMITED PARTNERSHIP	File No. BPH-870820MR

For Construction Permit for New FM Station, Channel 275C2, Shreveport, Louisiana

ORDER

Adopted: February 6, 1992; Released: February 14, 1992

By the Commission:

1. We have before us an application filed on September 23, 1991 by Innovative Women's Media Association ("Innovative") for review of a Memorandum Opinion and Order of the Review Board, 6 FCC Rcd 5018 (Rev. Bd. 1991), that affirms an order of the ALJ, FCC 91M-1859, rel. June 11, 1991, dismissing Innovative's application for failure to prosecute. We also have oppositions to the appeal filed by NTW, Inc. on October 1, 1991 and Caddo Broadcasting Limited Partnership on October 2. We agree with the Board's holding.[1]

2. ACCORDINGLY, IT IS ORDERED pursuant to 47 C.F.R. §1.115(g) that the application for review filed by Innovative Women's Media Association on September 23, 1991 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] We find no merit in the appellant's contention that its defaults are excusable because of problems that allegedly hindered its general partner from promptly securing substitute counsel after the attorney that had been representing it in this case resigned. The general partner's allegation that she had been hard put to find a replacement for the withdrawing counsel on her own because she did not know any communications lawyer is contradicted by her deposition testimony that she had been able to hire the original attorney because she knew "a number of Washington counsel" and because she had received recommendations from a number of people which she had compiled into a list and which her sons had investigated and evaluated on her behalf. (*See* Exhibit 5 to NTW's "Opposition to Appeal" filed June 28, 1991.) Moreover, the alleged difficulty in finding a substitute due to the prior and potentially conflicting commitments of many of the law firms that practice before this agency might have been avoided by retaining one of the attorneys who were representing the other applicants in which its limited partner holds an interest. In any case, the alleged problems of lack of knowledge and potential conflicts of interest have no bearing on Innovative's unexplained inaction between April 24 (when the former counsel resigned) and May 8 (when one of Innovative's partners contacted another attorney about representation) or on the unexplained delay between May 22 (when its present counsel, Cohn & Marks, agreed to represent Innovative for a limited purpose) and June 18 (when Cohn & Marks entered an unqualified appearance). Finally, although Innovative alleges that it is *now* "ready, willing, and able to proceed," it clearly was not ready to do so as of June 11, the date when the ALJ issued the dismissal order, having instead requested an open-ended postponement.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Personal Attack	8330-Z
Complaint of	91100517

Bree Walker Lampley, *et al.*

Against

KFI, Inc., Licensee of
Radio Station KFI(AM)

Los Angeles, California

STAFF RULING

Adopted: February 10, 1992; Released: February 14, 1992

By the Chief, Fairness/Political Programming Branch:

1. The Commission has before it a complaint, filed by Bree Walker Lampley and a number of disability rights organizations and individuals, alleging that radio station KFI(AM), Los Angeles, California, which is licensed to KFI, Inc., violated the Commission's personal attack rule, 47 C.F.R. § 73.1920, during a broadcast of a two-hour talk show hosted by Jane Norris in which Norris and call-in listeners discussed the issue of "whether it was fair [for the Lampleys] to knowingly pass along a deformity to a child." Specifically, complainants allege that the July 22, 1991, broadcast, "personally attacked Los Angeles news anchorperson Bree Walker Lampley's integrity and character solely because she, and her husband, Jim Lampley, decided to conceive a child knowing there was a 50% chance that their child would inherit her genetic condition of ectrodactylism." According to the complaint, the station did not allow either the Lampleys or other representatives of the disability community to air their views. Complainants also allege that the broadcast was biased against persons with disabilities, presented significant medical inaccuracies about Lampley and those who share her disability, and failed to operate in the public interest by harassing and discriminating against callers who attempted to express views contrary to those expressed by the station. Complainants assert that KFI presented a subsequent broadcast on the same issue in an August 28, 1991, two-hour program hosted by Tom Leykis, during which he and his guest, Jane Norris, discussed the "morality" of Lampley's pregnancy. During the Leykis broadcast, complainants state, both Norris and Leykis attacked the Lampleys and persons with disabilities. According to complainants, the station did not inform, nor allow, the Lampleys or any representative of the disability community to respond to either program.

2. By way of background, Bree Walker Lampley is an anchorperson with television station KCBS-TV, Los Angeles, California. Her condition, ectrodactylism, is a genetic condition in which the bones of the hands and feet are fused. At the time of the broadcast, Lampley was seven months pregnant with her second child. As the tape and transcript of the program reveal, the topic revolved around the wisdom of Lampley's decision to have a child, knowing that the child could inherit ectrodactylism. According to the complainants, talk show host Norris presented a "eugenics orientation"[1] to Lampley's pregnancy and to the reproductive rights of persons with disabilities.

3. Complainants ask the Commission to initiate an investigation, and request relief in the form of license revocation, a forfeiture, and an admonition, on the following bases:

a) KFI failed to operate in the public interest by ignoring its obligation to present conflicting views on issues of public importance;

b) The KFI broadcast contained factual inaccuracies and medical misinformation;

c) The KFI broadcast contained personal attacks upon complainants in violation of Section 73.1920 of the Commission's rules.

Public Interest

4. Complainants contend that KFI reneged on its obligation to operate in the public interest and afford a reasonable opportunity for the discussion of conflicting views on issues of public importance, under Section 315 of the Communications Act of 1934, as amended. Citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), among other cases, Lampley argues that broadcasters have a public interest obligation to give adequate coverage of public issues without bias. Although complainants acknowledge that the Commission has made some "administrative changes to the Fairness Doctrine," they argue that the U.S. Supreme Court has not found the doctrine unconstitutional, nor has Congress changed the language of Section 315 since 1987. In this case, complainants argue, Norris presented only a "eugenics orientation" to Lampley's pregnancy and to the reproductive rights of disabled persons, and cut off callers who disagreed with the eugenics viewpoint. Complainants also contend that, during the Leykis broadcast, Leykis and Norris ridiculed callers who disagreed with the hosts.

5. This aspect of the complaint invokes the fairness doctrine, which the Commission eliminated in 1987. *In re Complaint of Syracuse Peace Council*, 2 FCC Rcd 5043 (1987), *aff'd*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 717 (1990). Pursuant to a remand from the United States Court of Appeals for the D.C. Circuit in *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987), the Commission determined in *Syracuse* that the fairness doctrine contravenes the First Amendment and thereby disserves the public interest. In affirming the Commission's decision, the Court of Appeals upheld the Commission's finding that enforcement of the fairness doctrine is not in the public interest, without reaching the issue of the doctrine's constitutionality. *Syracuse Peace Council v. FCC*, 867 F.2d 654, 669 (D.C. Cir. 1989).[2] Accordingly, because the Commission no longer enforces the fairness doctrine, this aspect of the complaint is denied.

Factual Inaccuracies and Medical Misinformation

6. Complainants also ask the Commission to take action against KFI for disseminating factual inaccuracies and medical misinformation during the Norris broadcast. Specifically, the complainants allege that 1) the broadcast identified Lampley's condition as "syndactylism" instead of ectrodactylism;[3] 2) the broadcast described Lampley's condition not as a physical condition, but as a "disease," connoting contagion; and 3) the broadcast's medical expert, Dr. Steven York, whose presence gave the discussion an aura of credibility, failed to correct the medical misinformation.

7. Section 326 of the Communications Act generally prohibits the Commission from censoring program content or from interfering with the right of free speech.[4] Consistent with these First Amendment values embodied in the Act, the Commission long ago established that it cannot authenticate the news or act as the arbiter of the truth or falsity of matter that is broadcast. *Hunger in America*, 20 FCC 2d 143, 150-51 (1969). The Commission thus will investigate alleged inaccuracies only if it receives extrinsic evidence of intentional slanting of news broadcasts. *Id.* Complainants have furnished no such evidence here. The Commission, therefore, will take no further action regarding this portion of the complaint.

Personal Attack

8. Finally, complainants assert that the discussion on both broadcasts constituted a personal attack against the Lampleys and disability rights groups in general. The personal attack rule provides that if a station broadcasts an attack upon the honesty, character, integrity, or like personal qualities of an identified person or group during the presentation of views on a controversial issue of public importance, the station must notify the person or group attacked, send a transcript or an accurate summary of the broadcast, and afford an opportunity for response. 47 C.F.R. § 73.1920. Complainants frame the issue as "whether it was fair [for the Lampleys] to knowingly pass along a deformity ... [to a child]." We are unable to conclude, however, that complainants have established a *prima facie* case of a personal attack rule violation.

9. First, complainants have failed to address the controversiality of the issue discussed in the broadcast. *See Mark Brown v. Radio Stations WBZ and WRKO*, 64 RR 2d 908 (1988)(denial of personal attack complaint for failure to show controversiality of issue). A "controversial issue" is one that is the subject of vigorous debate, with substantial elements of the community in opposition to one another. *See, e.g., Fairness Report*, 48 FCC 2d 1, 12 (1974). Although Lampley's decision to bear a child generated much discussion on both Norris' and Leykis' shows, we have no indication that substantial numbers in the community were "vigorously debating" the issue. *See e.g., United Church of Christ*, 97 FCC 2d 433, 437 (1984)(licensee not unreasonable in determining that issue relating to nature of church expenditures not "controversial" for purposes of personal attack rule). In addition, complainants have failed to establish that the issue is one of public importance. Three factors are relevant to whether an issue is "of public importance.": (1) the amount of broadcast or newspaper coverage the issue has received; (2) the amount of attention the issue has received from government and other community leaders; and, most important, (3) the impact the issue is likely to have on the community at large. *Fairness Report*, 48 FCC 2d 1, 12. Lampley has apparently received much publicity in the national press as a result of the broadcasts, but the Commission has emphasized that an issue is not necessarily a matter of public importance merely because it has received broadcast or newspaper coverage. *Id.* at 11, *citing Healey v. FCC*, 460 F.2d 917, 922 (D.C. Cir. 1972). Here, the issue may have caught the attention of the media, but we have no indication that government and community leaders paid heed or that the issue has a significant impact on the community at large.

10. Moreover, even assuming that the issue met the "controversiality" and "public importance" requirements, complainants have failed to show that the nature of the discussion on either the Norris or Leykis broadcasts attacked the Lampleys' honesty, character, integrity, or like personal qualities. Mere criticism of or disagreement with one's actions or decisions does not rise to the level of a personal attack. *Hon. Les Au Coin*, 53 RR 2d 1024 (MMB 1983). Neither does every disparaging or unfavorable remark concerning an individual. *Id.* In any event, complainants do not specify, nor does the transcript show, any specific comments which could be deemed an attack on Lampley's integrity or character. At most, the comments of Norris and Leykis, and those of some of the call-in listeners, appear to express a disagreement with or disapproval of Lampley's (or more generally, a disabled person's) decision to bear a child. The program's alleged "bias" with respect to one viewpoint does not elevate the discussion to the level of a personal attack.

11. Finally, the discussion did not constitute a personal attack against any of the particular organizations named as complainants. An actionable personal attack complaint must specifically identify a particular individual or group. *Diocese of Rockville Center*, 50 FCC 2d 330 (1974). Contrary to complainants' allegation, neither broadcast leveled any particular allegation at any specific disability rights organization. *Robert L. Miller*, 47 RR 2d 1206 (B/c Bur. 1980)(critical reference to "right to lifers" did not constitute personal attack against any particular organization).[5]

CONCLUSION

12. Complainants have failed to establish a *prima facie* complaint that KFI has violated either the personal attack rule or any other Commission policies that would warrant the relief requested. Accordingly, their complaint against radio station KFI(AM), Los Angeles, California, IS DENIED.

13. Staff action is taken pursuant to delegated authority. Application for Review by the Commission may be requested within thirty days of the date of public notice of this ruling (see Commission Rule 1.4(b)) (47 C.F.R. Section 1.4(b)) by writing the Secretary, Federal Communications Commission, Washington, D.C., 20554, stating factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to parties to the complaint. *See* Commission Rule 1.115 (47 C.F.R. Section 1.115).

FEDERAL COMMUNICATIONS COMMISSION

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

FOOTNOTES

[1] According to Webster's dictionary, eugenics is the study of hereditary improvement by genetic control.

[2] Further, the Communications Act does not mandate the fairness doctrine. *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, *reh'g en banc denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).

[3] Syndactylism is a genetic condition resulting in the webbing of the skin on the hands, whereas ectrodactylism is a genetic condition in which the bones of the hands and feet are fused.

[4] Section 326 of the Communications Act states:

> Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

[5] In view of our disposition, we find it unnecessary to consider the subsequent pleading that has been filed in this matter by KFI, Inc. The informal objection filed by the Institute for Justice will not be resolved in this staff ruling either, as the Commission has not yet decided the precedential applicability of the *Meredith* decision to the personal attack rule. *See Notice of Proposed Rulemaking, Gen. Docket 83-484*, 48 Fed. Reg. 28295 (1983).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-205

In re Applications of

RADIO LAKE GENEVA CORPORATION — File No. BPH-900611MG

TOM KWIATKOWSKI — File No. BPH-900613MA

For Construction Permit for a
New FM Station on Channel 241A
in Lake Geneva, Wisconsin

Appearances

John S. Neely on behalf of Radio Lake Geneva Corporation and *Peter H. Doyle* on behalf of Tom Kwiatkowski.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: February 7, 1992; Released: February 18, 1992

1. Two applications of four designated for a comparative hearing for FM Channel 241A at Lake Geneva, Wisconsin remain to be considered on the following issues (*Hearing Designation Order*, 6 FCC Rcd 4627 (M.M. Bur. 1991)):

> 1. To determine whether there is a reasonable possibility that the tower height and location proposed by Kwiatkowski would constitute a hazard to air navigation.
>
> 2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

2. A prehearing conference was held on September 20, 1991. *Order*, FCC 91M-2367, released August 2, 1991; Tr. 1-10. Written testimony was exchanged on December 6, 1991 and evidence was received without oral examination on December 11, 1991. Tr. 11-41. The record was closed on December 11, 1991. Tr. 41. The applicants filed proposed findings on January 10, 1992 and Kwiatkowski filed a reply on January 24, 1992. RLGC filed a pleading of exceptions, which does not comply with the rules or order in this proceeding, on January 24, 1992.

FINDINGS OF FACT

Issue 1: Whether there is a reasonable possibility that the tower height and location proposed by Kwiatkowski would constitute a hazard to air navigation.

3. On November 1, 1991, the FAA issued an acknowledgement of Kwiatkowski's tower proposal and indicated that it would not be a hazard to air navigation. Kwiatkowski Exh. 2. Kwiatkowski, on November 21, 1991, in light of the FAA's conclusions, requested summary decision. The motion for summary decision was supplemented with a further FAA acknowledgement, which reaches the same conclusion, based on 6 kw of power, on January 29, 1992.

Issue 2: Which of the proposals would, on a comparative basis, best serve the public interest.

RLGC

Integration of ownership and management

4. RLGC does not propose to integrate any of its voting or nonvoting stockholders into the management of the Lake Geneva station. RLGC Exh. 1.

Auxiliary power

5. RLGC will install auxiliary power generators to permit continued broadcasting if there is a power outage. RLGC Exh. 1.

Diversification of the mass media

6. RLGC does not have an ownership interest in a medium of mass communications. RLGC Exh. 1. John F. Monroe, Jr., who owns 340 shares of nonvoting stock in RLGC, is an officer, director, and 27.78 percent stockholder in WMIR(AM), Lake Geneva, Wisconsin. *Id.* In addition, he owns 16.67 percent of WMIR as Trustee of the John F. Monroe Residuary Trust. *Id.* Monroe is an officer, director, and 80 percent owner, through the John F. Monroe Residuary Trust, of Richland Broadcasting Corporation, licensee of WRCO(AM-FM), Richland Center, Wisconsin. *Id.* Monroe promises to divest his interest in WMIR(AM), Lake Geneva if RLGC receives a grant. "Integration and Diversification Statement," filed August 26, 1991 by Radio Lake Geneva Corporation.

Kwiatkowski

Integration of ownership and management

7. Kwiatkowski proposes to work full time, 40 hours per week, as the general manager of the station. Kwiatkowski Exh. 1, at 1. Kwiatkowski is an individual applicant. *Id.* He will be responsible for overall supervision and direction of station affairs. *Id.* He will resign his current employment. *Id.*

8. Kwiatkowski has lived in Lake Geneva since August 1970. *Id.*, at 2. He has participated in local civic activities. Between 1980 and 1989, he was a Red Cross instructor in advance life saving. *Id.*, at 3. From 1979 to 1989, he appeared before local civic organizations where he gave talks on boating safety. *Id.* From 1984-1989, he participated in a water safety program for five year olds; the program took 3 hours per year. Since 1965, he has par-

ticipated in the Water Safety Patrol activities. *Id.*, at 4. He has been an active participant in local school activities, a church fraternal organization, a local church, a shelter for the homeless, an environmental group, and library programs. *Id.*, at 5-6. Some of these activities began in 1971 and many continue today. *Id.*

9. From 1984 to the present, Kwiatkowski has broadcast football and basketball games of the week on WMIR(AM). Kwiatkowski Exh. 1, at 7. He has also broadcast sporting events on cable television. *Id.*

Auxiliary power

10. Kwiatkowski will install auxiliary power at the studio and transmitter sites. Kwiatkowski Exh. 1, at 7.

Diversification of the mass media

11. Kwiatkowski has no mass media interests. Kwiatkowski Exh. 1, at 7.

CONCLUSIONS

Issue 1: Kwiatkowski's tower proposal will not constitute a hazard to air navigation.

12. Kwiatkowski submitted an acknowledgement from the FAA that his tower would not be a hazard to air navigation. RLGC, in an unauthorized pleading, argues that the power approved was not the 6 kw which Kwiatkowski proposed in his application. On January 29, 1992, the FAA issued another acknowledgement approving Kwiatkowski's 6 kw proposal. Kwiatkowski is technically qualified. RLGC argues that non-record material has been submitted by Kwiatkowski and that it should be stricken. The motion will be granted to the extent documents submitted by Kwiatkowski do not represent determinations by the FAA. Kwiatkowski's January 29, 1992 supplement to his motion for summary decision is being considered. RLGC has not opposed the motion for summary decision.

Issue 2: On a comparative basis, Kwiatkowski's proposal would best serve the public interest.

13. Kwiatkowski proposes to work full time, 40 hours per week, managing the Lake Geneva station. RLGC does not propose any integration of ownership into management. Neither applicant has cognizable mass media interests and both propose auxiliary power. Kwiatkowski is to be preferred for his superior comparative proposal.

Petition to Enlarge against RLGC

14. Kwiatkowski petitions to enlarge issues against RLGC to determine whether RLGC is financially qualified and whether RLGC falsely certified. Kwiatkowski maintains that RLGC's reliance on a letter from First Banking Center was misplaced because it expired in July 1990 and a new letter was not issued immediately. In a late-filed opposition, RLGC submits a letter from Roman Borkovec, who is President of First Banking Center, in which he states the loan was always in effect despite the expiration language.

15. Kwiatkowski's motion is very late in the proceeding, after the close of the record, and it relates to an applicant that has no comparative strength. Kwiatkowski maintains that RLGC withheld the relevant information that would have permitted him to raise the matter earlier. RLGC has not provided an answer to that allegation. If RLGC were a serious contender, that issue would be considered. The petition to enlarge is denied.

ACCORDINGLY, IT IS ORDERED that the motion for summary decision, filed November 21, 1991, supplemented January 29, 1992 by Tom Kwiatkowski IS GRANTED on the air hazard issue.

IT IS FURTHER ORDERED that the motion to enlarge issues, filed December 17, 1991 by Tom Kwiatkowski IS DENIED.

IT IS FURTHER ORDERED that the motion to accept opposition to petition to enlarge issues, nunc pro tunc, filed January 17, 1992 by Radio Lake Geneva Corporation IS GRANTED.

IT IS FURTHER ORDERED that the motion for official notice, filed February 6, 1992 by Tom Kwiatkowski IS GRANTED to the extent it applies to the motion for summary decision.

IT IS FURTHER ORDERED that the motion to strike non-record material, filed January 29, 1992 by Radio Lake Geneva Corporation IS GRANTED IN PART and IS DENIED IN PART.

IT IS FURTHER ORDERED that the application of Radio Lake Geneva Corporation (File No. BPH-900611MG) IS DENIED and the application of Tom Kwiatkowski (File No. BPH-900613MA) for a new commercial FM station on Channel 241A at Lake Geneva, Wisconsin IS GRANTED.[1]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Sec. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Request of

PARAMOUNT
COMMUNICATIONS, INC.

For Waiver of Section 73.3555(a)

MEMORANDUM OPINION AND ORDER

Adopted: February 5, 1992; Released: February 14, 1992

By the Commission:

1. We consider here the unopposed request of Paramount Communications, Inc. (Paramount), for a limited waiver of section 73.3555(a) of the Commission's Rules, 47 C.F.R. § 73.3555(a)(1990), the duopoly subsection of the multiple-ownership rule. We grant the requested waiver for the reasons set out below.

2. A brief summary of our ruling in *Channel 33, Inc.*, 4 F.C.C. Rcd. 7674 (1988), will aid in understanding Paramount's request. Grant Broadcasting System, Inc. (Grant), was once the licensee of three television stations, including WGBS-TV (channel 57, Ind.), Philadelphia, Pennsylvania, which is relevant to this case.[1] Grant incurred debts in the operation of the stations of about $420 million, which led to a bankruptcy proceeding. As a result, the Grant stations were assigned to subsidiaries of a new entity, now called Combined Broadcasting, Inc. (Combined). Combined has two classes of stock, each representing 50 percent of the corporation's equity and votes. One class is owned by former Grant Noteholders (14 shareholders) and the other by program distributors/producers (Programmers) to which Grant was indebted (54 shareholders), including Paramount.[2] According to Combined's 1990 Ownership Report, two Noteholders had ownership interests large enough to be cognizable under our multiple-ownership rule.[3] Among the Programmers, only MCA, Inc., held a cognizable ownership interest (11.9 percent).[4]

3. Under the reorganization plan approved by the bankruptcy court, the Programmers agreed to continue providing programming to the Combined stations, enabling them to compete effectively and to generate the revenues needed to pay the debts. Initially, the Programmers' equity interests in Combined were set by the percent of the total debt owed to them by Grant. An additional feature of the reorganization plan recognized that the viability of the stations depended on the success of the programs supplied to Combined, and thus it provided a mechanism to adjust the equity interests of the Programmers based on the amount and popularity of their programming broadcast by the stations.

4. In *Channel 33, Inc.*, we also considered the fact that the Grade B contours of station WWOR-TV (channel 9, Ind.), Secaucus, New Jersey and of Combined's Philadelphia station, WGBS-TV, overlap. The acquisition of the Grant stations by Combined presented a conflict with the multiple-ownership rule because of MCA's ten-percent interest in station WGBS-TV and its ownership of station WWOR-TV.[5] The applicants had therefore requested a waiver of the rule, which we granted. The bases for the waiver were fully set out in our decision, but rested primarily on three grounds: (1) MCA's interest in Combined was attributable, but not controlling; (2) our obligation to accommodate other federal policies where possible, including the bankruptcy laws, in making our public interest determinations; and (3) our conclusion "that the proposed reorganization plan may well represent the only means by which the [three Combined] stations can continue to provide service to the public." 4 F.C.C. Rcd. at 7679.

5. In the spring of 1990, the staff approved Paramount's acquisition of control of six television stations, including station WTXF-TV (channel 29, Fox), Philadelphia. At that time, Paramount held a 4.89-percent interest in Combined, which is less than the five-percent benchmark that triggers applicability of the multiple-ownership rule. Because Paramount's interest in Combined was not then cognizable, its acquisition of station WTXF-TV was then consistent with the rule. A problem arose as subsequent events unfolded. First, some of Combined's programmer/stockholders came under foreign control. To insure Combined's compliance with the alien-ownership guidelines set out in section 310(b)(4) of the Act,[6] some of the Programmers turned in portions of their Combined shares. This resulted in a percentage increase of the equity ownership of the remaining Combined stockholders, including Paramount. Further, Paramount's programs proved popular and, under the adjustment mechanism established in the court-approved reorganization, Paramount is entitled to an increased equity share. As a result of both developments, Paramount is now entitled to slightly over 5.5 percent of Combined's stock. That

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[1] The other former Grant stations are WBFS-TV, channel 33, Miami, Florida, and WGBO-TV, channel 66, Joliet, Illinois.

[2] The two groups of shareholders each elect three Combined Directors who, in turn, elect a seventh Director.

[3] Those interests are held by Executive Life Insurance Co. (20.95 percent) and Magten Asset Management Corp. (8.29 percent). Voting interests of five percent or more are generally cognizable under section 73.3555.

[4] We authorized MCA to own ten percent of Combined's stock in *Channel 33, Inc.* As a result of the same factors confronting Paramount, described below, MCA's interest temporarily exceeded ten percent by a small margin. Combined now advises that MCA's interest is currently about 9.4 percent. The small, temporary departure from the authorized ten-percent interest is now rectified, and MCA and Combined are clearly aware of their obligation in this regard. No further action on this matter is warranted.

[5] We later approved a transfer of control of station WWOR-TV. *WWOR-TV, Inc.*, 6 F.C.C. Rcd. 1524 (1991), *reconsideration denied*, 6 F.C.C. Rcd. 6569 (1991). Although the MCA ownership interest in station WWOR-TV is now removed, two MCA principals are members of the Board of Pinelands, Inc., the parent of the current licensee of WWOR-TV. Thus, the waiver granted to MCA in *Channel 33, Inc.* is still necessary because of these remaining positional interests.

[6] The limits and guidelines applicable to alien involvement in United States broadcast licensees are set out in 47 U.S.C. § 310(b).

amount exceeds the five-percent benchmark specified in the multiple-ownership rule, a fact that resulted in Paramount's waiver request.[7]

6. Paramount seeks a waiver to permit ownership of up to ten percent of Combined's stock. In support of its request, it offers a number of facts and contentions. It generally states that its request is consistent with the ten-percent exemption accorded to MCA in *Channel 33, Inc.* Paramount will not have a representative on the Combined Board, although MCA is permitted to have such representation.[8] Moreover, "as a condition of being permitted to acquire the requested increased interest, [Paramount] hereby agree[s] to forego such Board representation so long as the waiver is in effect." As an existing shareholder of Combined, and under the court-approved reorganization, Paramount's role in Combined has been limited to providing programming pursuant to arm's-length negotiations, receiving debt service payments,[9] and receiving financial information, also available to other shareholders, in the normal course of business. Paramount represents that its degree of involvement in Combined's affairs will not change if the waiver is granted.

7. Paramount states that its initial stock interest and the increased interest proposed here are not the result of an intent to acquire an attributable or controlling interest in Combined, but instead flow directly from its status as a creditor of the former bankrupt licensee. Paramount refers to our policy of considering the policies underlying the bankruptcy laws in making our own public interest determinations, a policy that was considered in reaching our decision in *Channel 33, Inc.* Paramount's position arises out of the same bankruptcy proceeding and the same reorganization plan. We are told that the plan is working and that the Combined stations are moving toward financial stability, in large part because the "automatic adjustment mechanism ensures that the Programmers receive fair compensation for the programming they have provided, and continue to provide, to the stations."

8. Paramount lists numerous competing media in the Philadelphia market.[10] Paramount advises that its station (WTXF-TV) and Combined's station (WGBS-TV) are not commonly controlled and are separately staffed, programmed and operated. They have no common employees, managers, officers or directors. Paramount is a widely held company with diverse entertainment and publishing businesses, along with its six television licenses. Combined is a three-station licensee owned equally by two groups, the Noteholders and the Programmers. Anything that must be voted on by Combined shareholders requires the majority vote of both shareholder groups. The Programmers elect only three of Combined's seven Directors. Therefore, Paramount asserts, the Programmers as a group cannot dictate Combined's policies. Thus, Paramount, as but one of 54 Programmers, is not in a position to control Combined's operation, or even influence it beyond the extent indicated above. In these circumstances, Paramount concludes that there will be little, if any, effect on diversity of programming viewpoints or economic competition in the Philadelphia television market.[11]

9. We find Paramount's showing persuasive. It seeks a modest waiver of the duopoly rule to permit ownership of up to 10 percent of Combined's stock. Its request is made necessary by the adjustment mechanism that was an important element in the reorganization plan approved by the court. Denial of the waiver would penalize a party whose programming has aided in bringing financial stability to the formerly bankrupt stations. We conclude that the public interest will be served by a grant of the requested waiver. In reaching that conclusion, we rely on Paramount's representations, specifically including its statement that it will not seek a representative on Combined's Board of Directors as long as the waiver is in effect. Further, the waiver applies only to any increased equity interest that Paramount might acquire solely as a result of the equity-adjustment mechanism specified in the court-approved reorganization plan.

10. Accordingly, IT IS ORDERED, that the request of Paramount Communications, Inc., for a waiver of section 73.3555(a) of the Commission's Rules to permit acquisition of up to ten percent of the stock of Combined Broadcasting, Inc., IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[7] Paramount instructed Combined to make no transfers of its stock so as to increase Paramount's equity interest above 4.99 percent, until the Commission acts on the waiver request. Combined has, however, credited Paramount with the 5.5-percent interest on its books because it considers itself obligated to do so. In any event, Paramount states that until this matter is resolved, it will not vote any of its Combined shares.

[8] MCA's waiver involved stations in two different markets. On that point, Paramount's position differs from MCA's because the two stations involved here are in the same city. We note the distinction, but believe that the other factors recited here, on balance, provide persuasive support for our conclusion that there will be no significant reduction in the substantial competition and diversity that exists in the Philadelphia market. See footnote ten, below.

[9] As of April 30, 1991, Paramount's share of the total debt owed to the Programmers was $18.5 million.

[10] There are 11 commercial and six noncommercial televisions stations in the market, as well as five cable systems with 65-percent penetration. There are also 29 AM and FM stations licensed to Philadelphia proper, without consideration of stations licensed to surrounding communities.

[11] The Commission's television multiple- and cross-ownership rules are included in a pending broad inquiry into the current state of the video marketplace. *Policy Implications of the Changing Video Marketplace*, 6 F.C.C. Rcd. 4961 (1991) (Notice of Inquiry in MM Docket No. 91-221). By our action here, we do not necessarily determine the ultimate result of that inquiry or any subsequent proceeding related to it. *Beaufort County Broadcasting Co. v. FCC*, 787 F.2d 645, 649 n.2 (D.C. Cir. 1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-181

In re Applications of

BARRY SKIDELSKY	File No. BPH-870819MO
BRADMARK BROADCASTING COMPANY	File No. BPH-870819MT
NORMANDY BROADCASTING CORPORATION	File No. BPH-870819NK

For a Construction Permit for a
New FM Station on Channel 289B1
at Queensbury, New York

MEMORANDUM OPINION AND ORDER

Adopted: February 5, 1992; Released: February 18, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. The Review Board has before it a Petition For Reconsideration, filed January 24, 1992, by the Commission's Mass Media Bureau and directed toward the Board's *Decision*, FCC 91R-115, released January 2, 1992, in the above-captioned proceeding. [1]

2. The Bureau's petition points out that in the *Initial Decision*, 6 FCC Rcd 2221 (ALJ 1991), Normandy Broadcasting Corporation was found to have provided untruthful information in its threshold showing of the non-entertainment programming of WYLR(FM), Glens Falls, New York. [2] Because the Board found that Normandy was clearly disqualified for lack of a transmitter site, it did not find it necessary to reach the question of Normandy's showing as to its programming on WYLR(FM).

3. However, the petition before us states (at 3-4; footnotes omitted):

> The Bureau has reviewed relevant portions of the Queensbury trial record, the applicants' proposed findings of fact and conclusions of law, the *I.D.*, and the applicants' exceptions and replies. Based on the evidence presented, the Bureau believes that Normandy intentionally tried to "beef up" its Threshold Showing by pervasively distoring facts and figures about the nature and extent of WYLR (FM)'s non-entertainment programming. As the Presiding Judge stated, "[t]he number and breadth of the errors in Normandy's Threshold Showing were more than exaggerations; Normandy's claims were false and unsubstantiated." 6 FCC Rcd 2230 at [para.] 59. Accordingly, the Board should conclude that Normandy made material misrepresentations and lacked candor in its Threshold Showing."

4. The Bureau further advises that currently before it is the renewal application for Normandy's WYLR(FM), filed on January 29, 1991, and that the application remains "pending before the Commission." *Id.*, at 2. (Indeed, it is quite beyond that, for we take notice of the ongoing comparative renewal hearing involving WYLR(FM). *See Prehearing Conference Order*, (MM Dkt. No. 92-6), FCC 92M-121, released January 28, 1992.) Asserting that "[b]ased on the doctrine of collateral estoppel, a final adjudication in this Queensbury proceeding of the character-related issues specified against Normandy would preclude relitigation of the same matters in a subsequent proceeding involving renewal of the license of WYLR(FM)," Petition at 2-3, the Bureau urges that we reconsider our *Decision* in the instant proceeding and resolve adversely the misrepresensation issue against Normandy.

DISCUSSION

5. Whereas we profoundly respect the intervention of the Bureau and agree that a complete relitigation of the same misrepresentation issue in the ongoing comparative hearing would be wasteful of the resources of all concerned, we decline to reconsider our prior *Decision*, but treat the matter in a manner we believe will alleviate all legitimate concerns.

6. Recalling that Normandy Broadcasting has been here disqualified squarely on a transmitter site issue, we do not believe it necessary or expedient to belabor this otherwise ordinary comparative licensing case with a superfluous issue. The Commission, most lately, has placed an additional premium on expediting the resolution of comparative contests so as to speed the delivery of new services to the public. *Proposals to Reform the Commission's Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157 (1990), *modified on recon.*, 6 FCC Rcd 3403 (1991). *See generally also Hillebrand Broadcasting Inc.*, 1 FCC Rcd 809 (Rev. Bd. 1985). As the Commission has repeatedly iterated, "[a]n agency, like a court, need not decide questions which are not relevant to its decision." *Colonial Communications, Inc.*, 6 FCC Rcd 2296 (1991)(quoting *Deep South Broadcasting Co. v. FCC*, 278 F.2d 266 (D.C. Cir. 1960)). This has been true even with respect to *basic* qualifying issues. *Rebecca L. Boedker*, 6 FCC Rcd 2557, 2559 n.2 (1991). *Accord, Oliver Kelly And Mary Ann Kelly*, FCC 91R-110, released December 16, 1991. *See generally also Marlin Broadcasting of Central Florida, Inc., v. FCC*, No. 90-1505, slip op. at 14-15 n.8 (D.C. Cir. Jan. 7, 1992).

7. And even where an issue might well be relevant to a collateral proceeding, the Board does not generally pause to decide a non-decisional issue in the particular comparative fray before it, as this would seriously delay the progress of a multiparty licensing proceeding in which the *raison d' etre* is to select a comparative winner and to provide a fresh broadcast service to the community. For example, in the just issued *Shawn Phalen*, FCC 92R-1, released January 23, 1992, [3] the Board found it unnecessary to protract that comparative licensing proceeding by addressing *additional* disqualifying issues against the

discredited applicant, even though that "applicant" (by implication of a real-party finding) was (as is Normandy here) in the throes of a contemporaneous comparative renewal proceeding, and where the Board recognized the potential impact on the collateral case. *See id.*, para. 20 & n.20.

8. At the same time, the Commission has long recognized that it need not relitigate the same issue involving the same party in multiple proceedings. Thus, for instance, in *RKO General, Inc.*, 94 FCC 2d 890 (1983), the Commission determined that it would rely upon the findings and conclusions of the ALJ presiding in the license renewal proceeding for KHJ-TV, Los Angeles, for its record with respect to thirteen other RKO stations, under the collateral estoppel doctrine. It explained (*id.*, at 894 n.15):

> Invocation of the doctrine of collateral estoppel bars relitigation of the same issues in subsequent proceedings involving the same parties or their privies. 1B *Moore's Federal Practice*, 0.441[2], at 3777 (2d ed. 1974). Davis, relying on the Restatement (Second) of Judgments (1982), explains that the:
>
> traditional language of "res judicata" and "collateral estoppel" has given way to the new vocabulary of "claim preclusion" and "issue preclusion." The second restatement helpfully explains . . . : The principle underlying the rule of claim preclusion is that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so. A related but narrower issue -- that one who has actually litigated an issue should not be allowed to relitigate it -- underlies the rule of issue preclusion. *Davis Administrative Law Treatise*, §21:1, at 48 (2d ed. 1983).

9. In *Ocean Pines FM Broadcasting Partnership*, 4 FCC Rcd 3490 (Rev. Bd. 1989), we therefore held that the ALJ there presiding did not err in adding an issue to take into consideration the real-party-in-interest findings and conclusions of another ALJ presiding in a collateral proceeding (*Key Broadcasting Corp.*, 3 FCC Rcd 6587 (1988)), for we there again rehearsed the Commission's declaration that:

> An initial decision is not a mere report to be arbitrarily disregarded. In the absence of review, the intial decision is the decision of the agency. Section 557(b) of the Administrative Procedure Act. Even when review is granted, the initial decision must be taken into account by the agency and when necessary by a reviewing court.

Stereo Broadcasting, Inc., 74 FCC 2d 543, 546 (1979). In fact, when the *Key Broadcasting* case settled before we could address the exceptions lodged there on the disqualifying issue, the Board reviewed the *Key* hearing record, the findings and conclusions, and the *Key* exceptions to resolve the issue in our later *Ocean Pines* decision. [4] We see no reason why the same protocol should not be routinely employed here. *See generally also Carmel Broadcasting Limited Partnership*, FCC 90M-3695, released November 23, 1990 (ALJ).

10. Hence, though we will not interrupt this instant comparative proceeding to determine an issue now more directly relevant to the WYLR(FM) renewal proceeding, the ALJ there presiding should not relitigate the programming misrepresentation issue tried in this instant proceeding. Rather, an issue should be framed exactly as it was in *Ocean Pines*, *see* 4 FCC Rcd at 3490, to determine whether the findings and conclusions of the ALJ presiding in this Queensbury proceeding should disqualify Normandy Broadcasting in the Glens Falls proceeding. [5] In that regard, we note that the *Ocean Pines* ALJ permitted the applicant to adduce any *additional* evidence it believed was exculpating. *Also cf. Peoples Broadcasting Corp.*, 92 FCC 2d 1303, 1305-06 (Rev. Bd. 1983)(subsequent affirmances omitted). *But compare WIOO, Inc.*, 54 RR 2d 1291, 1299 (1983), where the Commission held that, under the doctrine of collateral estoppel, the presiding ALJ did not err in rejecting evidence directed toward findings and conclusions made in a prior case. Since the issue we here suggest in the Glens Falls proceeding presupposes the tentative efficacy of the subject findings and conclusions in the instant proceeding, we will, if necessary, review Normandy's relevant exceptions filed in this case in the context of the Glens Falls proceeding. *Ocean Pines*. We do observe, however, that the specific issue we advocate in the Glens Falls case is different, and we expect the arguments there to focus instead on the complex legal and policy issues inherent in that consequent issue. *See, e.g.*, KQED, Inc., 5 FCC Rcd 1784 (1990), *recon. denied*, 6 FCC Rcd 625 (1991), *aff'd per judgment sub nom., California Public Broadcasting Forum v. FCC*, No. 91-1111 (D.C. Cir. Sept. 30, 1991); *WIOO, Inc.* [6]

11. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed January 24, 1992 by the Mass Media Bureau IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] The Bureau candidly recognizes that "its prior participation in this proceeding was limited, as is customary in similar cases, to the comparative coverage aspects of the standard comparative issue." It therefore filed no prior pleadings (exceptions or comments) with the Board on the issue it now wishes the Board to address. The Bureau's lateness is not a matter of concern because "we are considering . . . basic qualifications and the public interest will be best served by considering the Bureau's arguments." *TeleSTAR, Inc.*, 2 FCC Rcd 7352 (1987)(Comm'n accepts Bureau pleadings filed 6 months late in adjudicatory proceeding).

[2] As to that threshold showing, the *Initial Decision* found:

> Normandy's material claims were false or unsubstantiated. Normandy's Threshold Showing may not have been a planned deception but the showing was done with so little care, the errors were so pervasive and its

> response to the designated issue so inadequate that Normandy has destroyed any possibility that the assertions about its broadcast record can be relied on.

6 FCC Rcd at 2230. When combined with Normandy's failure to make an accurate ownership report, the ALJ here found that it would "not make a trustworthy licensee." *Id.*, at 2230-31.

[3] *Modified*, FCC 92R-13, adopted January 24, 1992.

[4] *See Ocean Pines LPB Limited Partnership*, 5 FCC Rcd 5821 (Rev. Bd. 1990).

[5] Unlike the situation in *Rebecca L. Boedker, supra*, our instant *Decision*, with purpose, did not vacate the ALJ's findings and conclusions on the misrepresentation issue.

[6] We also note that, even if the Board resolved the Normandy misrepresentation issue in this proceeding, it would not put to rest the question of its basic qualifications, here or in Glens Falls, for the Commission need not always accept the views of the Board and/or the Bureau on basic qualifying matters, but will sometimes prefer the resolution of the presiding ALJ. *See, e.g.*, Silver Star Communications-Albany, Inc., 6 FCC Rcd 6905 (1991); *Broadcast Associates of Colorado*, 104 FCC Rcd 16 (1986); *WIOO, Inc., supra*. By deflecting focus of the Normandy misrepresentation issue into the Glens Falls proceeding, it spares all of the parties to this instant case further litigation unnecessary to its outcome, it expedites new service to Queensbury, and it allows the parties, the Bureau, the Board and the Commission to consider the vicissitudes of Normandy's conduct in a forum where the issue truly has a decisional dimension.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-258

In the Matter of

Ohio Public Safety Plan

ORDER

Adopted: February 6, 1992; Released: February 13, 1992

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On April 25, 1991, Region 33 (Ohio) submitted its public safety plan to the Commission for review. The plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in Ohio. On May 30, 1991, Ohio filed revisions to the plan, based on conversations with the Commission's staff.

2. The Ohio plan was placed on Public Notice for comments on August 30, 1991, 56 FR 46181 (September 10, 1991). The Commission received comments from the Indiana Region 14 Public Safety Planning Committe (Indiana) and reply comments from the Ohio Regional Planning Committee (Ohio).

3. In reviewing Ohio's plan, Indiana located 28 conflicts in Ohio's frequency allocation tables involving areas bordering Indiana. Indiana's concerns were brought to the attention of Ohio and the two regions resolved the frequency allocation conflicts.

4. We have reviewed the plan submitted for Ohio and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Ohio.

5. Therefore, we accept the Ohio Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in Ohio may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT
COMMUNICATIONS COMPANY
LIMITED PARTNERSHIP
Complainant,

v. File No. E-90-156

NEVADA BELL,
Defendant.

ORDER

Adopted: January 30, 1992; Released: February 14, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On May 3, 1990, US Sprint Communications Company Limited Partnership (hereinafter "Sprint") filed the above-captioned formal complaint against Nevada Bell seeking recovery of damages for Nevada Bell's alleged overearnings on interstate access services for the period January 1, 1987 through December 31, 1988. In accordance with Commission rules governing formal complaint proceedings, Nevada Bell filed an answer to the complaint.

2. The parties to the above-captioned complaint have conducted discussions aimed at settling the complaint. As a result of these negotiations, Sprint states that a mutually agreeable settlement of all pending controversies was reached. On January 7, 1992, Sprint filed a motion seeking dismissal of its complaint. We are satisfied that dismissal of the the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the motion to dismiss the above-captioned complaint IS GRANTED and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT
COMMUNICATIONS COMPANY
LIMITED PARTNERSHIP
Complainant,

v.

THE DIAMOND STATE TELEPHONE COMPANY,	File No. E-89-371
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES, and	File No. E-89-372
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-373
Defendants.	

ORDER

Adopted: January 31, 1992; Released: February 14, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On September 20, 1989, US Sprint Communications Company Limited Partnership (hereinafter "Sprint") filed the above-captioned formal complaints against The Diamond State Telephone Company, The Chesapeake and Potomac Telephone Companies, and New Jersey Bell Telephone Company (hereinafter the "Defendants") seeking recovery of damages for the Defendants' alleged overearnings on interstate access services for the period October 1, 1985 through December 31, 1986. In accordance with Commission rules governing formal complaint proceedings, the Defendants filed answers to the complaints.

2. The parties to the above-captioned complaints have conducted discussions aimed at settling the complaints. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies was reached. On January 9, 1992, the parties filed a joint motion seeking dismissal of the complaints. We are satisfied that dismissal of the the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the joint motion to dismiss the above-captioned complaints IS GRANTED and that the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SOLUTIONS INTERNATIONAL, INC. File No. I-T-C-92-037

Application for authority to provide international services including private line, switched voice and INTELSAT Business service.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: February 6, 1992; Released: February 14, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of private line, switched voice and INTELSAT Business Services (IBS) between the U.S. and points listed below by Communications Solutions International, Inc. (CSI).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-037 IS GRANTED, and CSI is authorized to:

a. establish channels of communication between the U.S. and INTELSAT Atlantic Ocean Region (AOR) satellites for the provision of IBS and international television service between the U.S. and those points listed in Comsat's Tariff for the space segment of IBS and international television service, provided, however, that CSI shall seek separate authority to construct and operate IBS earth station facilities pursuant to Title III of the Communications Act of 1934, as amended;

b. lease from Comsat and operate 120-64 Kbps satellite circuits between MCI's Andover, Maine earth station and an appropriate INTELSAT AOR satellite, connecting with similar circuits between the satellite and earth stations in the Russian Republic, the Moldavian Republic and Panama furnished by CSI's correspondents;

c. lease from MCI and operate 120-64 Kbps circuits in the Andover, Maine earth station;

d. lease and operate necessary domestic connecting facilities; and

e. use the facilities in b, c, and d above to provide switched voice service between the U.S., on the one hand, the Russian Republic (50 circuits), the Moldavian Republic (50 circuits), and Panama (20 circuits), on the other hand;

f. lease space segment capacities from Comsat and earth segment capacities from MCI's earth stations at Andover, Maine, Los Angeles, California and Miami, Florida the numbers of 64 Kbps circuits listed in the Appendix hereto;

g. lease and operate necessary domestic connecting facilities; and

h. use the facilities in f and g above to provide private line service between the U.S. and the points listed in the Appendix hereto.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between the applicant and its correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

Country	No. of Circuits (64 kbps)
Bahrain	10
Costa Rica	10
Czechoslovakia	10
Egypt	10
El Salvador	10
Gabon	10
Guatemala	10
Honduras	10
Hungary	10
Ivory Coast	10
Jordan	10
Kuwait	10
Kenya	10
Moldova Republic	10
Morocco	10
Niger	10
Nigeria	10
Panama	10
Paraguay	10
Peru	10
Poland	10
Russian Republic	20
Saudi Arabia	10
Senegal	10
Tunisia	10
Turkey	10
United Arab Emirates	10
Uruguay	10
Zaire	10
Zambia	10

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-17

In the Matter of

Amendment of Section 90.631 of the Commission's Rules and Regulations Concerning Loading Requirements for 900 MHz Trunked SMR Stations — RM-7827

NOTICE OF PROPOSED RULE MAKING

Adopted: January 30, 1992; Released: February 18, 1992

Comments: March 11, 1992
Reply Comments: March 23, 1992

By the Commission:

I. INTRODUCTION

1. By this *Notice of Proposed Rule Making (Notice)* we initiate a proceeding to examine whether Specialized Mobile Radio (SMR) licensees in the 896-901/935-940 MHz (900 MHz) band should be granted limited relief from the loading requirements of Section 90.631(b) of the Rules, 47 C.F.R. § 90.631(b). On June 26, 1991, the National Association of Business and Educational Radio, Inc. (NABER) filed a petition for rule making to amend Section 90.631 of the Rules to extend the five-year loading deadline for 900 MHz SMR licensees by two years. NABER recommends that, in the eight largest urban markets, this extension be available only to licensees that can demonstrate loading of at least 20 mobiles per channel (20 percent of the required 100 mobiles per channel) five years from the date of license grant.

II. BACKGROUND

2. Trunked systems are authorized based on a loading level of 100 mobiles per channel. Section 90.631 of our Rules requires applicants for trunked systems to certify that they will load their systems to at least 70 percent of this level (70 mobiles per channel) within five years of their license grant.[1] In accordance with Section 90.631(b) of our Rules, if all the channels in a licensee's radio service category are assigned within the system's geographic area, failure to load the system to 70 percent within the first five years results in automatic cancellation of any channels not loaded to 100 mobile units.

3. In 1987, the Commission began licensing the 399 channels in the 896-901/935-940 MHz band in accordance with the procedures established in Gen. Docket No. 84-1233[2] and a November 4, 1986, public notice entitled "Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands."[3] Two hundred of the channels were set aside for SMR operations. To expedite 900 MHz SMR service to areas most in need, applications were only accepted within 46 designated filing areas (DFAs) encompassing the 50 top markets in the country. Licenses for SMR systems have been granted within all these DFAs, except for the San Diego, California, DFA where no licenses have been granted pending discussions with Mexico on the use of these channels. Because many licensees of trunked SMR systems failed to construct and place their systems in operation within one year, as required by Sections 90.631(e) and (f) of our Rules, the authorizations of these licensees have cancelled and their channels have been recovered. Licensees that have completed construction and placed their stations in operation within the required one year are presently subject to the loading requirements of Section 90.631(b).

III. DISCUSSION

4. Due to a number of extenuating circumstances unique to the development of the 900 MHz SMR service [4] NABER asks that the Commission extend the loading deadline for each 900 MHz SMR trunked system by two years, but that within the eight largest urban areas, licensees be required to load their systems to 20 mobiles per channel five years from the date of license grant in order to qualify for the two-year extension. This, NABER states, will allow operators to complete loading of their systems in an orderly manner and will allow the Commission to release spectrum outside of the DFAs without disruption to the continued development of service offerings within the DFAs.

5. The early licensees in the 900 MHz SMR service entered a highly competitive market with full knowledge of the difficulties they might encounter in establishing and expanding their business -- and in meeting our loading requirements. The multi-phase licensing scheme used for 900 MHz SMRs allowed expedited licensing in the major metropolitan areas. This licensing scheme, however, has also kept the 900 MHz SMR industry in the rudimentary stages of development by making it difficult to develop the types of wide-area and regional systems that are characteristic of current competitive SMR offerings. Accordingly, we have concluded that some relief from our loading standards may be appropriate for 900 MHz trunked SMR licensees.

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[1] 47 C.F.R. § 90.631.

[2] Report and Order, Docket 84-1233, 2 FCC Rcd 1825 (1986).

[3] Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands, 1 FCC Rcd 543 (PRB 1986).

[4] According to NABER, these circumstances include 1) difficulties in the development of suitable 900 MHz equipment, 2) delays in system development resulting from speculation in conjunction with lotteries held to select SMR licensees, and 3) impediments to the development of an effective and competitive 900 MHz SMR service that have resulted from our limiting licensing to the 46 DFAs.

6. We have not granted new 900 MHz SMR licenses for some time, pending resolution of the proceeding in PR Docket 89-553.[5] It is therefore difficult to gauge demand for 900 MHz SMR channels accurately. NABER believes it appropriate to judge demand by market size and recommends that licensees in the top eight markets be required to show 20 percent loading in order to receive an extension of their loading deadline. While NABER's suggestion is workable, we believe a simpler approach would be more appropriate. We propose merely to extend the loading date for all 900 MHz SMR systems licensed on or before June 30, 1989, by granting these licensees, if otherwise qualified, a two-year renewal and relieving them from the automatic cancellation rule until the expiration of the two-year period.[6] At the expiration of the two-year renewal, licensees will be required to meet all loading requirements normally associated with the initial five-year license.[7] Licensees that meet the 70 mobile per channel loading requirements of Section 90.631(b) at the end of their initial five-year license term would receive a standard five-year license renewal.[8] The proposed relief covers licenses granted during the first two years of 900 MHz SMR licensing. [9] The difficulties faced in establishing this new service, especially considering the restrictions imposed by our unique multi-phased licensing scheme, were greatest during the early stages of licensing. Subsequent licensees entered a more stable and widely recognized market thereby benefiting from the experiences of previous licensees. Accordingly, we believe that a two-year loading extension period for early 900 MHz licensees is appropriate to resolve this issue. [10] In the event, however, that the Commission decides not to grant the two-year loading extension, we seek comments on a transition period, or other method, appropriate for 900 MHz SMRs to meet the loading deadlines.

7. With the expiration of the first 900 MHz SMR imminent we recognize the need for immediate action in this matter. Given the uncertainties of a rule making proceeding, however, it is unlikely that final action on this matter will be taken prior to the expiration of some 900 MHz SMR licenses. Accordingly, we are hereby staying any 900 MHz SMR loading deadlines until 90 days from the effective date of a Report and Order in this proceeding.

IV. CONCLUSION

8. Our loading requirements were adopted to serve the public interest by preventing valuable spectrum from remaining fallow. By granting the early 900 MHz SMR licensees some relief from our loading requirements we will further the public interest by allowing the innovators in this new service to continue to operate and further the development of 900 MHz SMR systems.

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[5] *See*, Notice of Proposed Rule Making, PR Docket No. 89-553, 4 FCC Rcd 8673 (1989).

[6] Although we have recovered channels in many of the DFAs (*see* paragraph 3, *supra*), these channels are not available, pending the outcome of PR Docket 89-553. We therefore consider all 900 MHz SMR channels "assigned" in all DFAs and accordingly, all 900 MHz SMR licensees are subject to the loading requirements of Section 90.631(b).

[7] Currently, in accordance with Section 90.631(b), licensees are only subject to channel recovery for failure to meet loading requirements within five years of the grant of their initial license. After five years a licensee is no longer subject to channel recovery for failing to maintain adequate loading. Licensees receiving relief in accordance with our proposal, however, would not be required to satisfy loading requirements at the end of the five-year period. Instead, affected licensees will be required to satisfy loading requirements at the expiration of the two-year renewal license. The two-year renewal will be considered as part of the initial license term. Therefore, although licenses granted after June 1, 1993 would not normally be subject to loss of channels for failing to meet loading requirements, *see* Section 90.631(b), licensees obtaining two-year renewals will be subject to the five-year loading requirements of Section 90.631(b) of our Rules regardless of the date of grant. Also, in accordance with Section 90.631(b), a licensee would not lose channels for failing to meet the 70 mobile per channel loading requirement if channels are available in its geographic area at the time of the expiration of the licensee's two-year renewal.

[8] *See* 47 C.F.R. § 90.149.

[9] The first 900 MHz SMR license was granted on May 6, 1987 and will expire on May 6, 1992. Our proposed relief is extended to licenses granted during the two-year period from May, 1987 through June, 1989.

[10] The Special Industrial Radio Service Association, Inc. (SIRSA), the Telephone Frequency Advisory Committee (TELFAC), and the Council of Independent Communication Suppliers (CICS) have submitted a letter dated November 8, 1991, urging the Commission to grant similar relief to 900 MHz systems licensed in the Industrial/Land Transportation (I/LT) Pool. The situation with respect to 900 MHz I/LT systems, however, is vastly different from that of 900 MHz SMRs. First, unlike 900 MHz SMR systems, growth in the I/LT pool has not been limited by a unique licensing scheme. Licensing of 900 MHz I/LT channels has been consistent with licensing of 800 MHz I/LT channels while licensing of 900 MHz SMRs has been somewhat restricted. The justifications to extend loading for 900 MHz I/LT licensees that are proffered by SIRSA/TELFAC/CICS, such as difficulties in acquiring suitable equipment, problems associated with introduction of a new service, or a depressed economy, could be equally applicable to any new service and should, therefore, not serve as precedent for relief. Second, SMRs must compete with each other for customers. Licensees in the new 900 MHz SMR service may have found it difficult to attract customers because of licensing or equipment disadvantages. It is likely, however, that given time to overcome these disadvantages, legitimate 900 MHz SMR licensees will be able to satisfy our loading requirements. I/LT licensees, on the other hand, do not compete for customers and should only apply for enough channels to satisfy their actual needs. The number of mobiles required by an I/LT licensee is a product of the size of the licensee's business and can not be directly linked to equipment or licensing disadvantages. An I/LT licensee that can not meet our loading requirements, for whatever reason, is essentially warehousing spectrum in hopeful anticipation of long term growth of a business. Basing relief on the premise that a particular business has not grown as much as expected would serve as dangerous precedent and could justify extension of relief to licensees in most any service. 900 MHz SMR licensees are the only licensees that have been subject to a unique licensing scheme that may have impeded their ability to meet the loading requirements and they are the only licensees that warrant the proposed relief. I/LT channels that are being used inefficiently should be recovered and licensed to entities with immediate needs for spectrum. Accordingly, we decline to extend the proposed relief from our loading requirements to I/LT licensees and hereby decline to act upon the letter filed by SIRSA/TELFAC/CICS.

V. INITIAL REGULATORY FLEXIBILITY ANALYSIS

A. Reason for action

9. This proposal is intended to provide some relief from strict loading requirements to the initial licensees of the 900 MHz SMR service.

B. Legal basis

10. Sections 4(i), 303(g), 303(r) and 332(a) of the Communications Act of 1934, as amended, 47 U.S. C §§ 154(i), 303(g), 303(r), and 332(a).

C. Reporting, recordkeeping, and other compliance requirements

11. None.

D. Federal rules which overlap, duplicate or conflict with this rule

12. None.

E. Description, potential impact and number of small entities involved

13. The temporary relief from our strict loading standards will give 900 MHz SMR licensees with initial licenses granted prior to June 30, 1989, some of which are small entities, a better chance to develop their businesses. These licensees are also providing a valuable service to their users which are generally small entities. The proposed action would allow the licensees to continue providing such service. Beyond this, we are unable to quantify the potential effects on small entities. We therefore invite specific comments on this point by interested parties.

F. Any significant alternatives minimizing the impact on small entities and consistent with the stated objectives

14. None

VI. PROCEDURAL MATTERS

Ex Parte Rules-Non-Restricted Proceeding

15. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206 (a).

Comment Dates

16. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **March 11, 1992** and reply comments on or before **March 23, 1992.** To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

17. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

18. For further information regarding this *Notice of Proposed Rule Making*, contact Steve Sharkey, Private Radio Bureau, Land Mobile Microwave Division, Rules Branch, (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as Follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4,303, 48 Stat. 1066, 1082, as amended, 47 U.S.C. §§ 154,303, unless otherwise noted.

2. Section 90.631 is amended by revising paragraph (b), and by adding a new paragraph (i), to read as follows:

§ 90.631 Trunked systems loading, construction and authorization requirements.

* * * * *

(b) Each applicant for a trunked system shall certify that a minimum of 70 mobiles for each channel authorized will be placed in operation within five years of the initial license grant. Except as provided in paragraph (i) of this section, if at the end of five years a trunked system is not loaded to the prescribed levels and all channels in the licensee's category are assigned in the system's geographic area, authorization for channels not loaded to 100 mobile stations per channel cancels automatically. If a trunked system has channels from more than one category, General Category channels are the first channels to considered to cancel automatically. All licensees who are authorized initially before June 1, 1993, and are within their original license term or are within the term of a two-year authorization granted in accordance with paragraph (i) of this section are subject to this condition. A licensee that has had authorized channels cancelled due to failure to meet the above loading requirements will not be authorized to obtain additional channels to expand that same system for a period of six months from the date of cancellation.

* * * * *

(i) For SMRS category trunked systems licensed in the 896-901/935-940 MHz band and initially licensed on or before June 30, 1989, if at the end of the initial five-year license term the trunked system does not satisfy the loading requirements of sub-paragraph (b) of this Section, the licensee will be granted a two-year license renewal. Regardless of the date of grant of the two-year renewal the licensee will be required to fully comply with the minimum five-year loading requirements set forth in sub-paragraph (b) of this Section at the end of the two-year renewal term.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-226

In re Applications of

SALTAIRE COMMUNICATIONS, INC.	File No. BPH-880229NG
CHARLES S. FITCH, P. E.	File No. BPH-880301NW
WHSL CORPORATION	File No. BPH-880301OF

For Construction Permit for a
New FM Station on Channel 299A
in Pawcatuck, Connecticut

Appearances

Kathryn R. Schmeltzer, John K. Hane III, and *Lisa C. Wilson*, on behalf of SaltAire Communications, Inc.; *Charles S. Fitch, pro se*, on behalf of Charles S. Fitch, P.E.; *J. Richard Carr*, and *Audrey L. Allison*; on behalf of WHSL Corporation; and *Gary Schonman*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: February 10, 1992; Released: February 18, 1992

Preliminary Statement

1. This comparative proceeding involves the mutually exclusive applications of SaltAire Communications, Inc. (SaltAire); Charles S. Fitch, P.E. (Fitch); and WHSL Corporation (WHSL) for a new FM station on Channel 299A at Pawcatuck, Connecticut.

2. The three foregoing applications[1] were designated for hearing on the standard comparative issue. *Hearing Designation (HDO)*, 5 FCC Rcd 3260 at Para. 11 (Aud. Ser. Div. (1990). The HDO also provided for evidence concerning the differences in coverage among the applicants.

3. A prehearing conference was held on August 9, 1990, and hearings were conducted at the Commission's headquarters in Washington, D.C. on December 10-12, 1990. The record was closed by *Order*, 90M-3970, released December 14, 1990.

4. On February 11, 1991, the three remaining parties to this proceeding, WHSL, SaltAire, and Fitch, filed proposed findings of fact and conclusions of law on the standard comparative issue.[2] Soon thereafter, the Presiding Officer, by *Memorandum Opinion and Order*, FCC 91M-667, released February 19, 1991, enlarged the hearing issues to include the following:

> To determine whether Aubrey Hamilton, Jay B. Levin and John Spicer are real parties in interest in the application of WHSL Corporation and, if so, the effect thereof upon the applicant's qualifications to be a Commission permittee.[3]

Supplemental Findings on the added issue were filed on March 5, 1991; consolidated replies on the comparative and added issue were filed on March 15, 1991.

Comparative Issue
SaltAire Communications, Inc.

5. SaltAire is a for-profit corporation organized under the laws of the State of Connecticut. The SaltAire Certificate of Incorporation was filed with the State of Connecticut on September 24, 1987. Lois K. Girard is President, Treasurer and Director of SaltAire, and she holds 50% (100 shares) of the outstanding voting stock. Garrett Girard is Vice President, Secretary and Director of SaltAire, and he holds the remaining 50% (100 shares) of the outstanding voting stock. Lois and Garrett Girard are wife and husband (SaltAire Ex. 1; Tr. 16, 21-22, 48). They are the only two directors of SaltAire (Tr. 38).

Diversification

6. Neither SaltAire nor either of its shareholders has any ownership interest in or control over any media of mass communications (SaltAire Ex. 1).

Integration

7. *Lois Girard* will work full-time (40 or more hours per week) as Operations Manager of SaltAire's Pawcatuck station. As Operations Manager she will be directly responsible for the station's programming and business operations. She will supervise the traffic and public affairs departments and will oversee the Program Director and News Director. She will assist the General Manager in overseeing personnel and with choosing the station's format. She will also be responsible for implementing the station's Equal Employment Opportunity Program (SaltAire Ex. 2, p. 1).

8. At the present time, Mrs. Girard is employed as Executive Administrative Assistant to the Vice President/General Manager of Kellems Division, Hubbell Incorporated, Stonington, Connecticut; but in the event that SaltAire's application is granted, she will withdraw fully from this position and any other business interests that might require her time and attention, in order to work full-time at SaltAire's Pawcatuck station (SaltAire Ex. 2, p. 1).

9. Lois Girard resides at Route 1, Box 138E, Wilbur Road, Stonington, Connecticut where she has lived since October 1984. Pawcatuck, Connecticut is a fire district within the town of Stonington. Mrs. Girard's residence is within the 3.16 mV/m contour of SaltAire's proposed FM Station. She intends to continue to reside within the 3.16 mV/m contour of SaltAire's station if SaltAire is granted the construction permit. Lois Girard is a female. (SaltAire Ex. 1, p. 2).

10. Since March 1989, Lois Girard has been a member of the Board of Directors and Recording Secretary of the Pawcatuck Neighborhood Center, a non- profit social services agency which provides social services and human resources to area youths, the disadvantaged and the elderly, and maintains a daycare operation (SaltAire Ex. 2, p. 4). Mrs. Girard attends one Board meeting a month at the Pawcatuck Neighborhood Center for 2-3 hours in the evening. She also occasionally attends town meetings with the Board of Selectmen when the neighborhood center is on the agenda and she sometimes spends a few hours on Saturdays when there is a fund-raising event for the Pawcatuck Neighborhood Center (Tr. 30-31). Mrs. Girard has been a volunteer at the Mystic Chamber of Commerce Annual Outdoor Art Festival each year since May 1987 (SaltAire Ex. 2, p. 4). The Annual Outdoor Art Festival is a two-day weekend event in August and the activity leading up to the event begins each May. Prior to the event, Mrs. Girard works on mailings. She and her husband man the information booth at the event and sell posters and T-shirts (Tr. 31-32). Mrs. Girard has also served as a volunteer at the Easter Seals Annual Chocolate Challenge each year since January 1988 (SaltAire Ex. 2, p. 4; Tr. 32). In addition, she is a member and Secretary of the Quiambaug Cove Improvement/Restoration Project, an association of local area residents formed in December 1987 to clean up and restore the quality of Quiambaug Cove which is located in Stoningham, Connecticut (SaltAire Ex. 2, p. 4). The Quiambaug Cove Improvement/Restoration Project was formed in 1987 and Mrs. Girard has been a member since attending the initial meeting in December 1987. There are meetings 2-3 times a year to see how the group is progressing in obtaining federal and state grants to clean up the environment. Mrs. Girard also attends meetings at town hall when the project is on the agenda before the Board of Selectmen (Tr. 32). Since 1985, Mrs. Girard has been a member of the Mystic Seaport Museum where she has helped out with fund-raising events (SaltAire Ex. 2, p. 4; Tr. 33). Until 1989, she was a member of the Mystic Community Center where she helped out with some fund-raising (Tr. 33).

11. *Garrett Girard* will work full-time (40 or more hours per week) as General Manager of SaltAire's Pawcatuck station. As General Manager, he will be responsible for overseeing the day-to-day operations of the station. He will supervise start-up and pre-broadcast station development and will oversee all technical and legal aspects of the broadcast facility. Mr. Girard will be responsible for the hiring and firing of all station personnel and will supervise the sales department and oversee the station's programming operation (SaltAire Ex. 3, p. 1).

12. At the present time, Mr. Girard is employed as Sales Development Director for the Connecticut Radio Network (CRN), a division of CRN International, Inc., a company which provides programming to broadcast stations. In the event that SaltAire's application is granted, Mr. Girard will withdraw fully from and sever entirely his employment with CRN and any other business pursuits that might require his time and attention, in order to work full-time at SaltAire's Pawcatuck station (SaltAire Ex. 3, p. 1).

13. Mr. Girard resides at Route 1, Box 128A, Wilbur Road, Stonington, Connecticut where he has lived since October 1984. Pawcatuck, Connecticut is a fire district within the town of Stonington and Mr. Girard's residence is within the 3.16 mV/m contour of SaltAire's proposed FM station. He intends to continue to reside within the 3.16 mV/m contour of SaltAire's station if SaltAire receives the construction permit (SaltAire Ex. 3, p. 2).

14. Garrett Girard graduated from Boston University in 1966 with a B.S. in Broadcasting. Following graduation he worked as a full-time announcer at Station WPOP(AM), Hartford, Connecticut from 1966 to 1967. In 1967, he joined Station WHCT-TV, Hartford, Connecticut as an account executive and remained there until 1969. From 1969 to 1984, he worked at Stations WPOP(AM)/WIOF(FM), Hartford, Connecticut. He began working at the stations as an account executive and was promoted to Sales Manager in 1975. As Sales Manager, Mr. Girard directed a sales staff of approximately ten persons. In 1984, Mr. Girard became General Manager of Stations WNCL(AM)/WTYD(FM), New London, Connecticut where he directed day-to-day operations and supervised a staff of approximately twenty-five. He remained at WNLC/WTYD until 1986. As General Manager, he directed on-air public service campaigns that encouraged over fifty local community groups to record announcements that aired daily on the stations. From 1986-1989, Mr. Girard served as Eastern Regional Manager of the National Association of Broadcasters, directing membership development for a 12-state and 2-island region which included over 2,300 radio stations.[4] From June 4, 1990 until October 31, 1990, Mr. Girard was Sales Development Manager at Station WADK(AM) Newport, Rhode Island and Station WOTB(FM), Middletown, Rhode Island. His responsibilities included the development and servicing of new and existing advertisers. He resigned from this position to accept a position commencing November 2, 1990 as Sales Development Director for the Connecticut Radio Network (CRN), a division of CRN International, Inc., a company which provides a variety of programming to broadcast stations. At CRN, Mr. Girard is responsible for developing and serving new radio network advertisers (SaltAire Ex. 3, pp. 2-3).

15. From 1984-1986, Garrett Girard served on the Board of Directors of the Connecticut Broadcasters Association (CBA). During 1985, he directed the CBA's statewide anti-drunk driving public service campaign, an effort that resulted in over $750,000 committed in air time from CBA member stations (SaltAire Ex. 3, p. 3; Tr. 53-54). Mr. Girard also served on the Board of Directors of the Southeastern Connecticut Chamber of Commerce in 1986. He was personally invited to come on the Board as a Director (SaltAire Ex. 3, pp. 3-4; Tr. 59-60). From 1987 to the present, Mr. Girard has served on the Public Relations Committee for the United Way of Southeastern Connecticut. The public relations committee publicizes fundraising activities and creates public awareness campaigns for United Way. From 1988 to the present, Mr. Girard has served as a volunteer for the Mystic Chamber of Commerce Annual Outdoor Arts Festivals, one of the largest such festivals in the Northeast area. From 1988 to the present, Mr. Girard has also been a member of the Quiambaug Cove Improvement Association, a group which is seeking to improve and restore the water quality of Quiambaug Cove in Stonington, Connecticut (SaltAire Ex. 3, p. 4).

Auxiliary Power Proposal

16. SaltAire Communications, Inc. will install auxiliary power generators sufficient to ensure that the proposed Pawcatuck FM station will remain in operation in the event of a power failure (SaltAire Ex. 4).

Charles S. Fitch, P.E.

17. Charles S. Fitch, P.E. is an individual applicant (Fitch Ex. 1). Fitch contemplates that he may in the future incorporate and his wife may become an owner of stock, an officer, and/or director of the Pawcatuck station (Tr. 87-92). Mrs. Fitch has no intention of working at the station but Mr. Fitch considers her employment a "distant possibility" (Tr. 94). Mr. Fitch formerly obtained authorization for WCSF(FM) (then WIAK(FM)), Clifton Park, New York, as an individual proprietor (Tr. 86). He subsequently incorporated the licensee and included his wife as an officer and director (Tr. 86-87). Fitch has used joint marital funds to prosecute the Pawcatuck application and proposes use of joint funds to meet the Pawcatuck construction and initial operating expenses (Tr. 87).

Diversification

18. Charles S. Fitch, P.E. has no attributable media interests (Fitch Ex. 2 at 4).

Integration

19. Fitch proposes to work at the proposed station on a full-time basis as the station's general manager (at least 40 hours per week) (Fitch Ex. 2 at 1; Tr. 117).[5] His duties will include building the technical facilities, hiring personnel, managing daily operations, programming, sales, engineering, and legal matters (Fitch Ex. 2 at 1; Tr. 96-98, 106-109, 115, 117). Fitch plans to spend approximately 20 hours per week directly selling advertising time (Tr. 98). Fitch will also serve as the station's chief operator and may perform engineering tasks (Tr. 106-108).

20. Charles Fitch is presently employed as a consulting engineer on a full-time basis (Fitch Ex. 2 at 1; Tr. 71). Fitch will terminate this full-time employment upon receipt of the Pawcatuck construction permit (Fitch Ex. 2 at 1). Fitch plans to maintain the current status of his consulting engineer licenses from Connecticut and Pennsylvania (Fitch Ex. 2 at 4; Tr. 73). Fitch testified that he would not solicit consulting engineering work and would only accept jobs that were not time consuming. Tr. 74.

21. Fitch also owns and operates a tower rental business in Clifton Park, New York (Tr. 75). Fitch plans to continue to own and operate this business even in the event of a grant of his Pawcatuck application (Tr. 76). Fitch has contracted with a resident site manager to assist in the business (Tr. 75). Fitch visits his New York tower rental business, approximately 170 miles distant from Pawcatuck, about once every three months (Tr. 75-77).

22. Fitch resides outside the service area in Avon, Connecticut (Fitch Ex. 2 at 1; Tr. 63). He has never resided within the service area (Tr. 63). Fitch proposes future service area residence (Fitch Ex. 2 at 1; Tr. 70-71).

23. Charles Fitch has broadcast and broadcast-related experience. During an unidentified period prior to April, 1974, Fitch was employed as the director of engineering and program director of a "small chain of radio stations. (Keymarket)" (Fitch Ex. 2 at 3). From April, 1974 to July, 1976, he was the chief engineer of Sun Oil Company's corporate television facilities in Philadelphia, Pennsylvania (Fitch Ex. 2 at 3; Tr. 111-112). From July, 1976 to October, 1983, Fitch was employed as a unit engineer for KYW-TV, Philadelphia (Fitch Ex. 2 at 3). From October, 1983 to October, 1984, he was director of engineering for WTIC-TV, Hartford, Connecticut (Fitch Ex. 2 at 3; Tr. 83-85). From October, 1984 to JId. From November, 1984 to March, 1987, Fitch was the director of engineering for WVJV-TV (now WHSH-TV), Framingham, Massachusetts (Fitch Ex. 2 at 2; Tr. 84-85).

24. Fitch purchased the construction permit of WIAK(FM), Clifton Park, New York in 1983 (Tr. 77-78). From 1984 to 1987, in addition to his employment at stations WVJV-TV and WTIC-TV, Fitch was involved in starting-up WIAK(FM) and performing several consulting engineering projects (Tr. 85-86). From March to August, 1987, he built, operated and managed the Clifton Park station under the call sign WCSF(FM) (Fitch Ex. 2 at 2; Tr. 77, 81-83). Since August or September, 1987, he has been a full-time consulting engineer to broadcast stations and other clients (Fitch Ex. 2 at 2; Tr. 71).

Auxiliary Power

25. Charles S. Fitch, P.E. proposes to have auxiliary generators at both the studio and transmitter such that both locations will be able to supply their own power for full facility operations in the event of an interruption of utility-supplied power or any other similar emergency (Fitch Ex. 3).

WHSL Corporation[6]

Background

26. WHSL Corporation is a Connecticut corporation formed on February 24, 1988 (WHSL Ex. 1). Catherine M. Hamilton is the corporation's 100% stockholder and is its President, Treasurer, and sole Director (WHSL Exs. 1, 2 at 1). Joseph J. Selinger, Jr. is the corporation's Secretary (WHSL Ex. 1). Aubrey Hamilton, Jay Levin and John Spicer[7] are unsecured creditors of WHSL Corporation (WHSL Ex. 2 at 6). They have each executed a Participating Note and financial guarantee letter to WHSL Corporation whereby, in return for their cash investment, they receive interest based on a low fixed rate and additional interest computed from a formula based on available earnings, if any (Saltaire Exs. 16A, 17A, 18A). They have additionally agreed to guarantee bank financing of up to $275,000 (Saltaire Ex. 19A). By the terms of the notes, the holders have no control over the business, its management, or operation (Saltaire Exs. 16A, 17A, 18A; Tr. 315-316). Their sole power is to prevent the corporation's issuance of additional equities or debts which would take precedence over the rights of the noteholders. The noteholders hold no equity interest in the corporation.

27. Catherine Hamilton learned of the availability of the Pawcatuck FM channel as follows: In January, 1988, family friend John Spicer noticed an advertisement in a local newspaper that had been placed by broadcast consultant Consolidated Broadcast Services to announce the availability of the Pawcatuck FM channel (WHSL Ex. 2 at 4; Tr. 140-142, 643, 714). Spicer, a local businessman who

then owned two marinas, two ski shops, and is a founding director of the Bank of Mystic, briefly telephoned Consolidated for more information regarding the advertisement, the consultant, and the consultant's fee (WHSL Ex. 2 at 4; Tr. 640-641, 646, 725, 743). He then telephoned Aubrey Hamilton (Tr. 644-645, 693). Spicer and Hamilton, in addition to being friends for over eighteen years, had previously considered investing together in the Bank of Mystic project, although Hamilton had ultimately decided against it because he was about to retire (Tr. 643-645, 681, 695, 766).

28. During their conversation, Spicer suggested that the new radio station would not only be a good investment but it posed a possible career alternative for Hamilton's daughter, Catherine, who was looking to get out of her Massachusetts travelling sales job and to start a new career (Tr. 148, 726, 766, 768). Spicer has known Catherine Hamilton since before she was a teenager and thought this was a good opportunity for her (Tr. 741, 746-747, 767). Spicer indicated to Mr. Hamilton that he might be interested in investing in such a project if Catherine was interested in pursuing it but that he was not interested in owning or working at the station (Tr. 724, 726, 729, 768). Although he had no idea of what the station would be worth, he was familiar with local broadcasters and knew that they were doing okay (Tr. 752-753). Spicer, who is active in community affairs, also viewed the station as a possible benefit to the community which is largely ignored by other communications outlets (Tr. 723-724, 741-742). The conversation concluded with the idea that the Hamiltons and Spicer would meet to consider this possible project (Tr. 727). Aubrey also suggested that they include in this discussion Jay Levin, a prominent attorney and friend of theirs, for purposes of obtaining some general legal guidance (Tr. 727).

29. Audrey Hamilton is the 100% owner of Southeastern Enterprises of Groton, Connecticut, a firm that provides food and janitorial services to government offices under contract (Tr. 640-641, 715). He is in his sixties (Tr. 716). As a self-made man, he has sought to impress on his children the principal that it is better to own and operate one's own business than to work for others (Tr. 695). To that end, he had previously sought to interest Catherine in opening her own service contract business with his help (Tr. 696). Mr. Hamilton was also motivated to get his daughter into a better career-one she could "progress with" and to ensure she would be "successful in life" (Tr. 701, 712). He was thus quite willing to provide financial backing for the project provided that Catherine would own and operate the radio station (Tr. 140-141, 144, 695, 701).

30. Following his conversation with Spicer, Aubrey Hamilton discussed the radio station opportunity with Catherine (Tr. 140-141, 645). He showed her the newspaper advertisement and said that he and Spicer would be interested in investing in the station if she would agree to own, control, and manage the station (WHSL Ex. 2 at 4; Tr. 140-141, 144). Catherine thought the Pawcatuck radio station sounded like a good opportunity and she contacted the consultant and requested that further information be mailed to her (WHSL Ex. 2 at 4; Tr. 141, 157, 646). Aubrey Hamilton suggested that they consult with Jay Levin regarding starting up this project (WHSL Ex. 2 at 4-5; Tr. 401-405, 407, 647). Aubrey set up a meeting with Levin (Tr. 703).

31. Catherine Hamilton received and reviewed the package of information from Consolidated in early February (WHSL Ex. 2 at 7; Tr. 157-158). The package contained a cover letter, a contract, a blank application form, and sample bank and credit letters (Tr. 157-158, 284). Because she had no experience in the preparation of FCC applications, she retained Consolidated's services which included the services of consulting engineer Jeanne Smith and communications counsel Richard Carr for purposes of preparing the application (WHSL Ex. 2 at 7; Tr. 158-160). She signed the Consolidated contract and returned it with payment of the consultant's fee (WHSL Ex. 2 at 7; Tr. 160).

32. In early February, Catherine and Aubrey Hamilton and John Spicer met with Jay Levin at his office to discuss forming an applicant to be owned and controlled by Catherine Hamilton and the financing of such a project (WHSL Ex. 2 at 5; Tr. 191-192, 404-405, 495, 647). Upon learning more about the opportunity at the meeting, Levin also expressed an interest in becoming an investor in the project and suggested that his contribution take the form of legal services to the applicant (Tr. 176, 403, 413). Like Spicer, Levin is a close friend of the Hamiltons and he has met Catherine several times over the years (Tr. 403, 40). As a former Mayor of Groton, a member of the Connecticut State Assembly and candidate for Connecticut Attorney General, Levin had many dealings with Aubrey Hamilton, the Chairman of the Democratic Party (Tr. 400, 408, 649, 653, 731). Levin thought that the radio station sounded like a good investment, that Catherine would be able to learn the radio business, and that he liked the idea of investing with friends (Tr. 411-413).

33. The meeting lasted for over an hour (Tr. 203, 730). Levin recommended that Catherine's application adopt a traditional corporate form and, because she traveled constantly out of state, that she select a local attorney to act as the corporation's secretary (WHSL Ex. 2 at 5; Tr. 204, 413). The preparation of the application and the projected cost of the project were briefly discussed (Tr. 285, 745). Catherine brought the consultant's materials to the meeting (Tr. 284). At the conclusion of the meeting, it was agreed that Catherine Hamilton would be the 100% voting stockholder, President, Treasurer, and Director of the corporation to be formed. Messrs. Hamilton, Spicer, and Levin would be non-voting, preferred stockholders and directors and would loan funds for construction, operation and prosecution (Tr. 192, 196, 313, 484, 649). Each participant was to have a 25% equity interest (Tr. 495). Levin indicated that his firm would handle the formalities as the corporation's local counsel (WHSL Ex. 2 at 6; Tr. 175).

34. Catherine Hamilton began to prepare the application, often consulting with Roy Giles of Consolidated and Carr. (WHSL Ex. 2 at 7; Tr. 160, 284). She also had several discussions with Mrs. Smith, who located and obtained assurance for WHSL's transmitter site (WHSL Ex. 2 at 7-8; Tr. 185, 188). Messrs. Hamilton, Spicer and Levin had no role in the preparation of the application (WHSL Ex. 2 at 8; Tr. 653, 735). Ms. Hamilton gathered the data for the Equal Employment Opportunity Program, drafted a programming statement, and reviewed the construction and operation budget prepared by Consolidated and discussed the budget with her father (WHSL Ex. 2 at 8; Tr. 189-292, 327-328). She also sent a confirmation letter to the site owner (Tr. 185). Ms. Hamilton

also came up with the corporate name (Tr. 175). Messrs. Spicer, Levin, and Hamilton had no contact with the site owner (Tr. 187, 754).

35. Following the meeting, Levin approached another attorney at his firm, Joseph Selinger, to see if he could handle the applicant's incorporation and act as the corporation's secretary (Tr. 415, 481-483, 520). As instructed by Levin, Selinger drafted corporate documents reflecting Messrs. Spicer, Levin and Hamilton as non-voting stockholders and directors (Tr. 484-485, 492). However, this form was never formally adopted due to concerns that the investors' status as directors or officers would elevate them to a status or suggest a level of involvement that it was not their intent to have and be inconsistent with the plan to put total control in Catherine Hamilton's hands (Tr. 493-494). Selinger was also concerned with the potential for deadlock on the Board of Directors (Tr. 493-494). Additionally, communications counsel had advised Catherine that she should not include as officers or directors any equity owners who did not intend to work at the station (Tr. 494). Selinger's review of state law further determined that the proposed two-tier corporate form would be required to have more than one director (WHSL Ex. 2 at 6: Tr. 192, 197-198, 494). Selinger discussed the problem with Ms. Hamilton (Tr. 198).

36. Selinger recommended to Catherine Hamilton that participating notes be used (Tr. 378-383). He knew that the three creditors had no desire to have any role in the corporation and that they "didn't want to muddy the waters by being named as directors, and ultimately it was decided that they would not be named as officers either" (Tr. 512). Selinger told Ms. Hamilton that he thought that this particular arrangement would make sense because the creditors would have no ownership but there would be the incentive for their agreement to guarantee financing (Tr. 521). The financing commitment was important because it would enhance the ability of the corporation to get a loan and because Ms. Hamilton viewed the notes as a way of relieving her father of the burden of coming up with all of the funds. (Tr. 310, 757, 760).

37. Ms. Hamilton told Selinger that she would go with whatever would be the best way for her to maintain control. She also told him that she viewed the guarantee as the best way to secure a loan (Tr. 199, 310). Selinger stated that he talked to her about the notes in terms of coming up with a potential solution that would accomplish the investors' economic objectives and "at the same time try to make it unequivocally clear that Ms. Hamilton was going to be in control" (Tr. 496-497). Ms. Hamilton testified that she had separate conversations with each of the three creditors about the notes (Tr. 201). Levin stated that he felt more comfortable with the notes in view of his "limited participation" (Tr. 413-414). Spicer approved of the concept because he had wanted to be a purely passive investor (Tr. 730). Aubrey Hamilton did not care either way about the notes because he intended to loan his daughter all necessary funds for the project regardless of form (Tr. 664). Selinger stated that he thought the figures for interest rates in the notes were his suggestion (Tr. 521). The decision to use participating notes was made in February 1988, prior to the filing of the application (Tr. 282, 308).

38. At Catherine Hamilton's suggestion, Selinger drafted simultaneously with the participating notes an agreement whereby the investors would each guarantee $275,000 in future bank financing (Saltaire Ex. 19A; Tr. 323, 515). The figure was based on the estimated costs of construction and operation plus a small cushion (Tr. 461, 522). Ms. Hamilton wished to have this guarantee so that she could readily obtain bank financing as an alternative to borrowing the full amount from her father (Tr. 310-311). The three investors executed the notes and guarantee letter which were then sent to Ms. Hamilton (Tr. 263, 321).

39. Catherine Hamilton prepared a rough draft of the application, typed it, and sent it to Consolidated for review (WSHL Ex. 2 at 8; Tr. 285). On March 1, 1988, the filing date, Ms. Hamilton, accompanied by her father, traveled to Washington, D.C. where she met with both Mrs. Smith and Mr. Carr (WHSL Ex. 2 at 8; Tr. 292-293). She reviewed the application with Carr (WHSL Ex. 2 at 8; Tr. 293). She also reviewed Mr. Hamilton's finances and obtained an oral commitment from him for a loan of the expenses necessary for constructing and operating the proposed station for three months without revenue (WHSL Ex. 2 at 8; Tr. 193-194, 204, 334, 658). Mr. Hamilton insisted on traveling with his daughter to Washington because of his concern for her safety (Tr. 721).

40. The application as well as the applicant corporation were essentially dormant for the next two years following filing (Tr. 298, 396, 398). Ms. Hamilton knew that the application process would take a long period of time and thus she went ahead and moved to Massachusetts as required by her present employment (Tr. 373).

41. Ms. Hamilton testified that she often used a joint account shared with her father for the purpose of paying applicant expenses. She has been a signatory to the account since her family moved to Connecticut in 1972 (Tr. 161). She explained at hearing that she used the joint account instead of her own personal accounts "because he had more money than I did." (Tr. 162). The joint account contains funds from both Aubrey and Catherine Hamilton (Tr. 651). Ms. Hamilton testified further that although she had been advised to set up a corporate account at the time the application was filed, she failed to do so until designation for hearing. The main reason for the delay was Ms. Hamilton's procrastination coupled with the rationalization that the processing of the application would take an extensive and indefinite amount of time. Ms. Hamilton felt that, in the meantime, it would be easier to use the joint account (Tr. 244, 259-260). Ms. Hamilton opened the corporate account after the applications were designated with $1,000 of her own funds (WHSL Ex. 2 at 7; Tr. 177, 247, 682). Hers is the only name on the bank signature card for the account. Ms. Hamilton maintains the account checkbook (WHSL Ex. 2 at 7; Tr. 244, 255). Ms. Hamilton also retained Carr to represent WHSL at hearing and paid his retainer, over half of which payment was out of her personal funds (Tr. 234-235, 249).

42. At hearing, Catherine Hamilton admitted that she has not kept careful track of the precise amounts contributed by the three creditors since designation. She testified that she did not keep records other than the corporate checkbook because she felt that the keeping of formal records would only be required "once the license was issued, and once the corporation was actively doing something." She thought "it was just too early to get too involved into doing much more. It is my ignorance." (Tr. 398).

43. Ms. Hamilton has invested approximately $3000 of her own funds in the application thus far (Tr. 249). Spicer and Mr. Hamilton have contributed funds in excess of the $4000 amount stated in the notes and Levin has contributed funds and services in excess of $4000. The three gentlemen consider the excess amounts to be loans to the corporation (Tr. 315, 420, 473-474, 710, 771-772). The noteholders intend to contribute more to the corporation if necessary and to continue to guarantee bank financing (Tr. 434, 515, 661, 778).

44. Mr. Hamilton's testimony makes it clear that his prime interest in connection with the FM project is to support his daughter's desire to try a new career and to try to give her as much support as possible without any desire to control the applicant or the proposed station. He stated that "My concern was that my daughter get into something that she can progress with" and that "my one objective is to see that she be successful in life" (Tr. 701, 712). The record shows that Mr. Hamilton never contacted the consultant, that he did not assist in the preparation of the application and that he knows nothing about it (Tr. 646, 653). He accompanied Catherine on her trip to Washington when she came to review and sign the application because he worried about her safety (Tr. 721).

45. Mr. Hamilton explained at the hearing that his sole involvement with the application apart from financing was his assistance with the fulfillment of the public notice and public inspection file requirements. Mr. Hamilton took the texts of the public notices to the newspaper and the public inspection file to the library at his daughter's request because she was out of town on business, she was concerned that the Commission's requirements were timely met, and Mr. Hamilton lives near these locations (WHSL Ex. 2 at 9; Tr. 362, 651-652). Ms. Hamilton stated that she put the public file together, put the notices together and that she had simply asked her father to deliver them (Tr. 241). The newspapers directly billed Catherine Hamilton for the publication of the notices (Tr. 239-241, 248-249, 669-670).

46. Jay Levin had almost no involvement after the initial preincorporation meeting. After the application was filed, there were no meetings or phone calls with Ms. Hamilton (Tr. 297). He had never even seen the application when he testified and he met communications counsel for the first time on the day of his testimony (Tr. 457, 464). He has not seen a single pleading filed in this proceeding (Tr. 458). He did not know that a fee was paid to the FCC for the hearing (Tr. 463). Levin stated that he had one initial phone conversation with communications counsel and no others until counsel called him in connection with the Saltaire petition to enlarge issues (Tr. 443). Levin agreed to furnish as his contribution the legal work required to set up the applicant structure and complete the various documents (Tr. 407). He has not submitted a bill for services. The services rendered thus far have not reached the $4000 level (Tr. 420). He testified that "[a]s additional capital would be needed, we would execute successor notes" (Tr. 434).

47. Levin was a candidate for Attorney General of Connecticut at the time WHSL was formed and its application was prepared (Tr. 462, 649). He told Joseph Selinger that they were trying to "set up a corporation, and essentially put Ms. Hamilton in charge, and let her run with the ball" (Tr. 483). Selinger did the incorporation and related work for WHSL (Tr. 503). Levin did not assist Selinger in handling WHSL's formation and corporate formalities (Tr. 436). Levin had never seen the certification of incorporation filed with the secretary of state (Tr. 440). Levin stated that his candidacy for statewide office had resulted in him not seeing Mr. Hamilton over the last two years (Tr. 462).

48. Spicer who, as noted earlier, died in April 1991, had no role in the preparation of the application, and stated that he had never seen the application (Tr. 735). He had no discussions of substance with Jay Levin about the FM project other than the first meeting in Mr. Levin's office, and had no discussions in 1990. (Tr. 736). It was clear from the first meeting that the three creditors were not going to be involved and that Ms. Hamilton was going to be running the station with a "free hand" (Tr. 740). At the meeting, he agreed to provide financing in some form and that "Cathy was going to take control of the station and the application and all of that, and Levin was going to take care of the legals and I was done" (Tr. 729). He did not want to have any involvement "other than as a passive investor." He looked upon the arrangement as a "good opportunity for Cathy" and as a "safe opportunity for my investment" (Tr. 741). He did not talk to Levin about or kept up with the progress of the application (Tr. 757). He had never spoken with communications counsel until he met him at the airport in Groton to give him a ride and spoke to him for about five minutes (Tr. 735).

Integration

49. Catherine M. Hamilton will be integrated into the management of the proposed station on a full-time basis (a minimum of 40 hours per week) as General Manager (WHSL Ex. 2 at 1). Ms. Hamilton's duties in this position will include having supervisory authority over all station operations; development of the station's overall policies relating to sales, finances, programming, and personnel; implementation of the station's Equal Employment Opportunity Program; and, responsibility for all station employee hiring and firing (WHSL Ex. 2 at 1).

50. Catherine Hamilton is a female African-American (WHSL Ex. 2 at 1).

51. Catherine Hamilton formerly resided within the service area of the proposed Pawcatuck facility (WHSL Ex. 2 at 2). From 1972 to 1989, she resided in Groton, Connecticut, which is twelve miles from Pawcatuck and within the station's 1.0 mV/m contour (WHSL Ex. 2 at 2). Her Groton addresses were, from 1972 to 1985, 39 Broad Street Extension and, from 1985 to 1989, 100 Westwood Drive (WHSL Ex. 2 at 2; Tr. 128). Ms. Hamilton resided outside the service area on a temporary basis while attending Northeastern University in Boston, Massachusetts, during portions of 1975 to 1980 (Tr. 129). In August, 1989, she moved to 30 Hartford Road, Worcester, Massachusetts (WHSL Ex. 2 at 3; Tr. 128). Ms. Hamilton will move back to 100 Westwood Drive, Groton, and the Pawcatuck service area should WHSL's application be granted (WHSL Ex. 2 at 1; Tr. 246).

52. Ms. Hamilton is a 1980 graduate of Northeastern University with a Bachelor of Science and Education Degree (WHSL Ex. 2 at 2; Tr. 129). She is 33 years old (Tr. 161). Following graduation, she was employed by Southeastern Enterprises of Groton, Connecticut, as an on-site monitor reviewing contract bids, work schedules, and supply inventory (WHSL Ex. 2 at 2; Tr. 129-131). Since 1985, Ms. Hamilton has continued to work for Southeastern Enterprises on a part-time basis (Tr.

131-136). In October, 1984, Ms. Hamilton became a sales representative for Blue Cross/Blue Shield in Brockton, Massachusetts, selling group health insurance policies to businesses and state and federal government agencies (WHSL Ex. 2 at 2-3; Tr. 136-140). In January 1989, she became a professional sales representative for Winthrop Pharmaceuticals where she makes personal calls on and introduces new products to physicians and hospitals in the Worcester and Springfield, Massachusetts areas which are approximately 75 miles apart (WHSL Ex. 2 at 3; Tr. 132-124). This employment required her to relocate to the Worcester area and to travel approximately 800 to 1000 miles every week (WHSL Ex. 2 at 3; Tr. 134). In the event WHSL's application is granted. Ms. Hamilton will resign from Winthrop Pharmaceuticals and any other employment she then has in order to fulfill her integration pledge (WHSL Ex. 2 at 1).

Diversification

53. Neither WHSL Corporation, Catherine M. Hamilton nor Joseph J. Selinger, Jr. has any interest in any medium of mass communications (WHSL Ex. 3).

Auxiliary Power

54. WHSL Corporation will employ use of auxiliary power generators at both its transmitter and studio sites to permit continued operations during emergencies and commercial power outages (WHSL Ex. 4).

Comparative Coverage

55. Paragraph 9 of the *Hearing Designation Order* directed that the areas and populations which would receive FM service of 1.0 mV/m or greater intensity, together with the availability of other primary aural services in such areas, be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants. 5 FCC Rcd at 3261.

56. The following table lists the total areas and populations within the sponsoring applicants' 1.0 mV/m contours:

Applicant	Area (sq. km.	Population
SaltAire	1,440	228,400
Fitch	1,340	114,700
WHSL	1,130	149,500

(Joint Engineering Ex. 1 at Table II).

57. During daytime and nighttime hours, all of the areas that each of the applicants would serve already receive five or more aural services. (Jt. Eng. Ex., p. 4). None of the applicants provides coverage to underserved areas (served by fewer than five aural services), white areas (areas that presently receive no service) or grey areas (areas that presently receive only one service).

CONCLUSIONS

Real Party In Interest Issue

58. The test for determining whether a third party is a real party-in-interest is whether that person has an ownership interest or will be in a position to control actually or potentially, the operation of the proposed station. *See San Joaquin Television Improvement Corporation*, 2 FCC Rcd 7004, 7008 (1987) and cases cited therein. WHSL's three creditors, Aubrey Hamilton, John Spicer and Jay Levin have no ownership interest in WHSL. Catherine Hamilton, Aubrey Hamilton's daughter, is the 100% stockholder of WHSL and its sole officer and daughter. The question posed, therefore, is whether WHSL's creditors have controlled or will control the proposed station. The overwhelming record evidence indicates that Ms. Hamilton has sole control over the applicant corporation and that none of the creditors are real parties in interest in WHSL.

59. The question of whether Hamilton, Levin and/or Spicer are real parties in interest turns on a review of WHSL's financing arrangements and their involvement in WHSL's affairs. Hamilton, Levin and Spicer have each executed a Participating Note and financial guarantee letter to WHSL whereby, in return for their cash investment, they receive interest based on a low fixed rate and additional interest computed from a formula based on available earnings, if any. They have additionally agreed to guarantee bank financing of up to $275,000. Saltaire Ex. 16A to 19A. By the terms of the notes, the holders have no control over the business, its management, or operation. Their sole power is to prevent the corporation's issuance of additional equities or debts which would take precedence over the rights of the noteholders. The noteholders hold no equity interest in the corporation. The use of participating notes including the method of computing interest rates was the brainchild of Selinger.

60. A creditor is not deemed ordinarily to possess control. *Morris, Pierce and Pierce*, 88 FCC 2d 713, 717 (Rev. Bd. 1981). It is clear that under the notes the creditors have no ownership or control. Among other things, the noteholders have no voting rights, no control or voice in management or operations of the proposed radio station, and cannot prevent the corporation from issuing stock, mortgaging property and taking out loans. The notes' only limitation on corporate actions relate to the issuance of additional equities or debt that would interfere with the priority of the note payment. However, such a limitation is common in all bank lending documents and do not give the noteholders control over basis business decisions.

61. Further, the fact that the noteholders calculate additional interest on the notes based on available earnings of the business does not lead to the conclusion that the creditors have an equity interest in WHSL. It has long been held by the courts that sharing in profits does not establish the existence of an ownership interest. A participation share of profits equal to 80% was held to be within a creditor-debtor relationship in *Kena, Inc. v. Commissioner*, 44 B.T.A. 217 (1941), and, in a more recent bankruptcy court decision, *In Re Washington Communications Group, Inc.*, 18 B.R. 437 (1982), where the sharing of profits was on an escalating scale up to 40%, the court found that the creditors were not owners of the business. The court cited to Section 7 of the Uniform Partnership

Act which provides that no inference of partnership shall be drawn by receipt of profits if such profits were received in payment "[a]s interest on a loan though the amount of payment varies with the profits of the business." It is clear that under the notes the creditors have no ownership of control.

62. As pointed out by WHSL, there is a reasonable trade-off for Ms. Hamilton's agreement to pay additional interest based on profits in view of the risk being taken by the noteholders. First, the noteholders cannot declare a default if the 6% base interest cannot be paid annually. Second, the base interest is very low and the notes are unsecured. Third, the payment of additional interest based on profit is only paid out of available earnings. Fourth, the noteholders cannot require the sale of the station; such decision is solely within Ms. Hamilton's control. Further, they have all clearly stated that they understood and agreed from the beginning that if the WHSL application is granted, Ms. Hamilton will have a free hand to run the business. Catherine Hamilton will run the business including expenditures, hiring of personnel, and setting of salaries--including her own.

63. The record shows that the use of participating notes, rather than the proposed two tier corporate form, was adopted precisely because the three creditors had no desire to have any role in the corporation and to put total control in Catherine Hamilton's hands. The creditors' lack of involvement in the affairs of WHSL is amply reflected in the record. Since the incorporation of WHSL and the filing of the application, the role of the three creditors has been solely to provide funds. Mr. Hamilton has had a slightly expanded role in assisting his daughter. He has additionally pledged to lend her funds for the construction and operation of the proposed station; he has accompanied her to Washington, D.C.; and he has performed limited clerical tasks under her supervision. Mr. Hamilton's actions fall well within the ambit of permissible parental involvement. *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423 (Rev. Bd. 1983); *Cannon's Point Broadcasting Co.*, 93 FCC 2d 643 (Rev. Bd. 1983); *Magdalene Gunden Partnership*, 2 FCC 5513, 5516 (Rev. Bd. 1987); *Rebecca L. Boedker*, 5 FCC Rcd 2855, 2860 (Rev. Bd. 1990). Unlike *Shawn Phalen*, FCC 92R-1, released January 23, 1992 (Rev. Bd.)., this is not a case involving a white male disadvantaged from a comparative perspective or a financier with a history of owning broadcast stations. This is simply a case of a father seeking to help his daughter with no strings attached. The real party in interest issue is resolved in favor of WHSL.

Standard Comparative Issue

Diversification

64. None of the applicants has any attributable media interest in any other medium of mass communications. Thus, diversification is not a factor in the comparative evaluation of the applicants.

Best Practicable Service

Integration (*Quantitative*)

65. The three applicants all receive 100% quantitative integration credit. Fitch proposes to work as a full time general manager and move to the service area to fulfill his commitment. Fitch proposes to terminate his full time employment as a consulting engineer. Although Fitch intends to maintain his tower rental business and may accept consulting jobs from time to time, there is no evidence that such activities will preclude his full-time commitment to the proposed station.

66. Saltaire's two principals have also committed themselves to work full time at the proposed station. Both will occupy management level positions and their integration proposals will be credited.

67. WHSL is entitled to 100% fulltime quantitative integration credit for the proposed participation of its sole stockholder, Catherine Hamilton in the day-to-day management of the station. The record establishes that Ms. Hamilton is in control and will be in control of the proposed station. It is clear that she is the only person who was involved in the preparation and prosecution of the application. As discussed supra, the limited activities of Mr. Hamilton do not change the fact that Ms. Hamilton is in control. Moreover, Ms. Hamilton's initial use of a joint checking account that she shared with her father and her poor record keeping is inconsequential and has no bearing on her control of the one person corporation or her ability and willingness to effectuate her integration proposal. WHSL's integration proposal will be fully credited.

Integration (Qualitative)

68. Of the three applicants, Fitch runs a distant third. Fitch receives only broadcast experience credit and credit for proposed future service area residence. Of the two remaining applicants, WHSL possesses the superior qualitative attributes. WHSL receives substantial credit for 100% minority and female status. Saltaire can only claim 50% female credit and is entitled to slight to moderate gender enhancement credit. Also, Ms. Hamilton has long time local residence as compared to the Girards who can only claim residence since October 1984. The Commission has made clear that civic activities are to be considered with local residence as a unified comparative factor. *Ronald Sorenson*, 6 FCC Rcd 1952 (1991). WHSL shows no civic activities for Ms. Hamilton; Saltaire shows some civic activities for the Girards, much of which is of lesser importance since it occurred after Saltaire's application was filed. The lack of civic activities diminishes WHSL's advantage but does not negate WHSL's superiority. WHSL receives slight to moderate enhancement. Saltaire receives slight enhancement for local residence and civic participation. Saltaire only enjoys an advantage under broadcast experience. Garrett Girard, Saltaire's 50% stockholder has prior broadcast experience including service in a management capacity. However, broadcast experience is deemed of minor significance. Overall, when the enhancement factors are weighed, WHSL is entitled to a preference for integration.

Auxiliary Power

69. The three applicants propose the installation of auxiliary power equipment. All receive the slight credit accorded for such proposals. Saltaire's contention that WHSL should be denied credit is rejected. Saltaire bases this contention solely on the ground that Ms. Hamilton did not personally obtain costs for an emergency generator. Tr. 327-328. However, Saltaire failed to inquire whether Ms. Hamilton's attorney or engineer, acting on her behalf, obtained such information. Saltaire also failed to explore whether WHSL's budget cushion provides the necessary funds. *See* Tr. 328. On the basis of the record, there is no reason to deny credit to WHSL.

Comparative Coverage

70. The highest comparative coverage preference is generally awarded to the applicant proposing to provide a first or second service. In this case, none of the applicants will provide service to any underserved areas. The entire area to be served by the Pawcatuck applicants is already served by eleven other aural services. When areas are well-served, only a slight preference will be awarded to applicants proposing substantially greater overall coverage. *See Simon Geller*, 90 FCC 2d 268, 269, 276 (1982) (where a *slight* preference was awarded for four times more area and 315,000 more persons.) In *Barton Broadcasting Co.*, 104 FCC 2d 785, 791 (Rev. Bd. 1986), a 27% area and 44,215 population coverage difference resulted in a "very slight preference." In view of the fact that the entire area is well-served, the Presiding Judge agrees with Saltaire and WHSL that the Saltaire overall coverage difference of 78,900 persons over WHSL Corporation warrants only a very slight preference. *See Barton*, *supra*, and cases cited therein.

Comparative Summation

71. For the reasons discussed in paragraph 68, *supra*, WHSL receives an integration preference. WHSL's integration preference clearly outweighs Saltaire's very slight advantage for its superior coverage. WHSL is the preferred applicant and its application is granted.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[8] the application of WHSL Corporation for a construction permit for a new FM station on Channel 299A in Pawcatuck, Connecticut IS GRANTED; and the applications of Saltaire Communications, Inc. and Charles S. Fitch, P.E. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] The applications of Stonington Communications, L.P. and Kathleen Hinds were dismissed for failure to prosecute. *See Order*, FCC 90M-2095, released July 18, 1990.

[2] The Mass Media Bureau filed findings and conclusions solely on the coverage aspect of the comparative issue.

[3] No additional evidence was taken on the real party in interest issue.

[4] This employment was received as background information (Tr. 46).

[5] Fitch's direct case, which was prepared *pro se*, fails to state the position he will hold and the number of hours he will work. However, his integration statement which is referenced in his direct case exhibit (Fitch Ex. 2), specifies that he will serve as general manager and that he will work at least 40 hours. *See* Integration and Diversification Statement filed June 25, 1990. Official Notice taken.

[6] The findings under the comparative issue also are relevant to the added real party in interest issue.

[7] On May 7, 1991, WHSL reported that Spicer died on April 30, 1991. WHSL stated that Spicer's death will have no effect on WHSL's qualifications "Statement For The Record" filed May 7, 1991. Although Saltaire asserts in its Comments filed May 15, 1991, that Spicer's death affects WHSL's financial qualifications, Saltaire offers no evidence to support this contention. In this connection, as reflected in the *findings*, *infra*, Mr. Hamilton has agreed to finance all of WHSL's costs. Further, there is no evidence that Hamilton and Levin, the remaining two creditors, have withdrawn their agreement to guarantee a bank loan if that alternate course of financing is followed.

[8] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-25

In the Matter of

Amendment of Section 73.202(b), RM-7905
Table of Allotments,
FM Broadcast Stations.
(Fort Bragg, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 7, 1992; Released: February 18, 1992

Comment Date: April 10, 1992
Reply Comment Date: April 27, 1992

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of California Radio Partners ("petitioner"), licensee of Station KOZT(FM), Channel 237A, Fort Bragg, California, seeking the substitution of Channel 237B1 for Channel 237A and modification of its license accordingly to specify the higher powered channel.[1] Petitioner stated its intention to apply for Channel 237B1 if it is allotted to Fort Bragg.

2. We believe the public interest would be served by proposing the substitution of Channel 237B1 for Channel 237A at Fort Bragg, California, since it could provide the community with an expanded coverage area FM service. Channel 237B1 can be allotted to Fort Bragg at the petitioner's currently authorized site,[2] consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.

3. Since the petitioner's modification request at Fort Bragg conforms with the provisions of Section 1.420(g) of the Commission's Rules, we shall propose to modify the license for Station KOZT(FM) without entertaining competing expressions of interest in the use of Channel 237B1 at Fort Bragg, or requiring the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. In view of the above, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Fort Bragg, California	237A, 244B, 253A	237B1, 244B, 253B1[3]

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **April 10, 1992,** and reply comments on or before **April 27, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

California Radio Partners
Radio Station KOZT(FM)
124 East Laurel
Fort Bragg, CA 95437

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding.

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[1] Although petitioner's request indicates that the original copy of its proposal was signed, it failed to include an affidavit verifying that the statements contained in its petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.402(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. Petitioner is requested to rectify this omission in its comments.

[2] Coordinates for requested Channel 237B1 at Fort Bragg are 39-24-24 and 123-44-04.

[3] The Commission is currently considering a proposal to substitute Channel 253B1 for Channel 253A at Fort Bragg. *See Notice of Proposed Rule Making*, 6 FCC Rcd 6117 (1991), in MM Docket No. 91-310.

However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

MM Docket No. 89-592

In the Matter of

Amendment of Section 73.202(b), RM-7078
Table of Allotments,
FM Broadcast Stations.
(Cedar Falls, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 7, 1992; Released: February 18, 1992

By the Assistant Chief, Allocations Branch:

1. At the request of Denise Neubauer ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6 (1990), proposing the allotment of Channel 253C3 to Cedar Falls, Iowa, as the community's first local FM service. Petitioner filed comments reiterating her intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 253C3 to Cedar Falls, Iowa, since it could provide the community with its first local FM service. Channel 253C3 can be allotted to Cedar Falls in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 3, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Cedar Falls, Iowa	253C3

4. The window period for filing applications will open on **April 6, 1992,** and close on **May 6, 1992.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

[1] The coordinates for Channel 253C3 at Cedar Falls are North Latitude 42-31-30 and West Longitude 92-27-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-173

In the Matter of

Amendment of Section 73.202(b), RM-7171
Table of Allotments,
FM Broadcast Stations.
(Doolittle, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 7, 1992; Released: February 18, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 2010 (1990), proposing the allotment of Channel 264A to Doolittle, Missouri, as that community's first local service. The *Notice* was issued in response to a petition filed by Howard Smith ("petitioner"). Petitioner filed comments restating his interest in the allotment of a channel at Doolittle. No other comments were received.

2. As stated in the *Notice*, the petitioner originally requested the allotment of Channel 283A to Doolittle. However, to avoid a short spacing to a construction permit for Station KSLQ-FM, Channel 283A, Washington, Missouri, we proposed the allotment of Channel 264A at Doolittle. Channel 264A required a site restriction 10.1 kilometers (6.3 miles) west of the community. Station KSLQ-FM, Washington, Missouri, is now licensed at a site that is fully spaced to Channel 283A at Doolittle. While petitioner has indicated he will file an application for Channel 264A at Doolittle, he has expressed his preference for the allotment of Channel 283A at Doolittle as originally requested.

3. Based on the above information we believe the public interest would be served by the allotment of Channel 283A to Doolittle, Missouri, as that community's first local service. Channel 283A can be allotted to Doolittle, Missouri, in compliance with the Commission's spacing requirements, provided there is a site restriction 4.4 kilometers (2.8 miles) southwest of the community.[1] The site restriction will prevent a short spacing to Station KSLQ-FM, Channel 283A, Washington, Missouri.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 3, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Doolittle, Missouri	283A

5. The window period for filing applications for Channel 283A will open on **April 6, 1992,** and close on **May 6, 1992.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 283A, Doolittle, are 37-55-01 and 91-55-18. A counterproposal filed in MM Docket 89-120, 4 FCC Rcd 4900 (1989), proposed the allotment of Channel 283A to Northwye, Missouri, which would have been short spaced to the allotment of Channel 283A at Doolittle. However, in a *Report and Order* in that docket, adopted simultaneously with this action, the Northwye counterproposal was dismissed, thereby removing the conflict with Channel 283A at Doolittle.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-422

In the Matter of

Amendment of Section 73.202(b),	RM-6867
Table of Allotments,	RM-7039
FM Broadcast Stations.	RM-7099
(Mary Esther, Apalachicola, and Crawfordville, Florida)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 7, 1992; Released: February 18, 1992

By the Chief, Allocations Branch:

1. The Commission considers herein a *Notice of Proposed Rule Making* ("*Notice*") in this proceeding, 4 FCC Rcd 7083 (1989), in response to a petition (RM-6868) filed on behalf of Holladay Broadcasting Company, Inc. ("Holladay"), licensee of Station WYZB(FM), Channel 288A (105.5 MHz), Mary Esther, Florida. Holladay seeks to upgrade its station by substituting Channel 288C3 for Channel 288A at Mary Esther and modifying its license to specify operation on the higher class channel. Also considered as counterproposals in this proceeding were two petitions for rule making filed by B.F.J. Timm ("Timm"), permittee of Station WAPY(FM), Channel 288A, Apalachicola, Florida (RM-7039), proposing to upgrade that station on Channel 288C2,[2] and filed by Wakulla Broadcasting Associates ("Wakulla"), to allot Channel 289A (105.7 MHz) to Crawfordville, Florida (RM-7099) to provide that community with its first local FM service.[3] Rahu Broadcasting ("Rahu"), permittee of Station WNFK(FM), Channel 288A, Perry, Florida, filed comments in opposition to Timm's proposal to substitute Channel 221A (92.1 MHz) for Channel 288A at Rahu's station to accommodate the Apalachicola upgrade.[4] Holladay filed comments including a reply to the Apalachicola counterproposal. Timm filed comments, then a reply to the comments of Holladay, Wakulla, and Rahu, and subsequently a reply addressing again Wakulla's Crawfordville counterproposal.[5]

2. In its comments supported by an attached engineering statement, Holladay noted that while its proposal could be granted consistent with the Commission's provisions for minimum interstation distance separations relative to each of the proposals for Apalachicola and Crawfordville, they are short-spaced to each other. Consequently, Holladay asserts, since Wakulla's proposal to provide for a first local service in Crawfordville fulfills a higher allotment priority than Timm's proposed upgrading of WAPY(FM) in Apalachicola, and "there do not appear to be any other channels available" for Crawfordville, the Apalachicola allotment proposal must be denied and the Crawfordville proposal granted. In Timm's comments supported by a technical showing, he states that both Holladay's Mary Esther C3 proposal and Timm's Apalachicola C2 proposal can be granted, assuming use of the reference point at Apalachicola as given in the *Public Notice* of Timm's counterproposal. In Timm's replies, he suggests that Channel 231A may be substituted for Channel 289A at Crawfordville to eliminate the mutual exclusivity between its Apalachicola upgrade proposal and Wakulla's proposed allotment to Crawfordville.[6]

3. Wakulla in its comments opposes the Apalachicola upgrade, contending that not only would the Apalachicola upgrade be short-spaced to its Crawfordville allotment proposal but apparently would preclude the Mary Esther upgrade proposal because the Apalachicola site given in the *Public Notice* is "not feasible to use because |it| is located in the middle of a swamp." Therefore, Wakulla argues for a denial of Timm's Apalachicola proposal. Rahu also called for denial of that proposal as permittee of Station WNFK(FM) at Perry, Channel 288A. Rahu claimed that substitute Channel 221A, proposed by Timm to accommodate his proposal, is allegedly not equivalent to Channel 288A under the rules adopted in MM Docket No. 88-375[7] permitting certain Class A stations to operate with a maximum power of 6000 watts. However, because Rahu now requests that its comments in this proceeding be withdrawn, we will not further consider those comments.

4. After careful consideration of all the information before us, as a "threshold matter, we now realize that Timm's petition to upgrade its Apalachicola station was inadvertently accepted and place on *Public Notice*. To accommodate Timm's proposed upgrade of its station at Apalachicola, Station WNFK(FM) at Perry would be required to change its operating frequency from Channel 288A to Channel 221A. Timm was required to pledge to reimburse Rahu, the permittee at Perry, for his reasonable costs in changing its channel. Since the petition and the record do not contain a reimbursement pledge by Timm, its Apalachicola petition must be dismissed as procedur-

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[1] The communities of Apalachicola and Crawfordville have been added to the caption.

[2] Notice of Timm's petition for rule making was given by *Public Notice*, Report No. 1800, released November 3, 1989.

[3] Notice of Wakulla's petition for rule making was given by *Public Notice*, Report No. 1807, released February 6, 1990.

[4] Rahu had been granted an assignment of a construction permit (File No. BAPH-880624HM).

[5] Thomasville Radio, Inc. ("TRI"), licensee of Station WSTT-FM, Channel 296A, Thomasville, GA, also filed "Emergency Comments" more than a year after the comment period ended. They will be dismissed as untimely and will not be considered. In any event, as explained in para. 5 *infra*, TRI's concerns are alleviated by the allotment of alternative Channel 231A at Crawfordville by use of TRI's suggested site restriction for that channel.

[6] Timm also states that its proposed upgrade at Apalachicola would require that Channel 221A be substituted for Channel 288A at Perry, FL.

[7] *See Second Report and Order* in MM Docket 88-375, 4 FCC Rcd 6375 (1989), *aff'd*, 6 FCC Rcd 3417 (1991).

ally defective.[8] *See Circleville, Ohio*, 8 FCC 2d 159 (1967); *Brookville and Punxsutawney, Pennsylvania*, 3 FCC 5555 (1988); and *Augusta, Kansas*, 6 FCC Rcd 2043 (1991).

5. With dismissal of the Apalachicola proposal, we can now consider the mutually exclusive proposals for Mary Esther and Crawfordville. To resolve this conflict, we conducted a channel search and found an alternate channel--Channel 231A--for use at Crawfordville to provide that community with its first local service.[9] Therefore, we believe that allotting Channel 231A to Crawfordville would serve the public interest.[10] Therefore, Channel 288C3 can be allotted to Mary Esther.[11] We believe that the public interest would be served by providing for an upgraded Station WYZB(FM) at Mary Esther, which can be accomplished by substituting Channel 288C3 for existing Channel 288A.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 3, 1992**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

Community	Channel No.
Mary Esther, Florida	288C3
Crawfordville, Florida	231A

7. IT IS FURTHER ORDERED That, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Station WYZB(FM), Channel 288A, Mary Esther, Florida IS MODIFIED to specify operation on Channel 288C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. The window period for filing applications for Channel 231A at Crawfordville, Florida will open on **April 6, 1992** and close on **May 6, 1992.**

9. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

10. For further information concerning this proceeding, contact J. Bertron Withers, Jr., Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[8] Dismissal of Timm's petition does not preclude its refiling, and the subsequent issuance of a *Notice of Proposed Rule Making and Order to Show Cause* setting forth Timm's Apalachicola proposal and an order that Rahu, the permittee of the Perry station, show cause why its channel should not be changed.

[9] Channel 231A can be allotted at Crawfordville using a site restricted to 11.6 kilometers (7.2 miles) south southeast of Crawfordville at N 30-04-54 and W 84-19-27.

[10] Use of Channel 231A at Crawfordville satisfies TRI's objection to our consideration of Channel 298A (by listing of the channel in data base), as expressed in its dismissed "Emergency Comments." TRI had feared that use of Channel 298A would preclude use of Channel 296C1 for its Station WSTT-FM at Thomasville, GA. Allotment of Channel 296C1 to Thomasville would constitute an upgrade and is being considered in MM Docket No. 87-455. Nevertheless, as mentioned in n. 5, *infra*, TRI's concerns are alleviated by the allotment of Channel 231A to Crawfordville.

[11] Channel 288C3 can be allotted to Mary Esther using a site restricted to 19.8 kilometers (12.3 miles) east of Mary Esther N 30-23-30 and W 86-27-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-313

In the Matter of

Policy and Rules Concerning Rates
for Dominant Carriers

ERRATUM

Released: February 18, 1992

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On December 20, 1991, the Commission released an Order[1] in the above-captioned proceeding, dismissing as moot petitions for further reconsideration of the *LEC Price Cap Reconsideration Order*.

2. Sentence two of paragraph one of the *December 20 Order* and footnote 2 are corrected to read as follows:

> Four parties petitioned for further reconsideration of that order on the single issue of the Commission's establishment of an interim approach for the evaluation of new service rates.[2]

3. Paragraph three of the *December 20 Order* is corrected to read as follows:

> 3. Accordingly, IT IS ORDERED that the petition for further reconsideration filed by BellSouth, Southwestern Bell, the United States Telephone Association, and the GTE Service Corporation ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Memorandum Opinion and Order, FCC 91-344, 6 FCC Rcd 7482 (1991) (*December 20 Order*).

[2] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Petitions for Further Reconsideration filed by BellSouth Telephone (BellSouth), Southwestern Bell Corporation (SWB), the United States Telephone Association (USTA), and the GTE Service Corporation (GTE).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Lewis Broadcasting Corporation	File Nos. BR-890131UJ BRH-890131UK

For Renewal of License of
Station WZRX(AM)
Jackson, Mississippi and
Station WSTZ-FM
Vicksburg, Mississippi

and

RadioSouth of Mississippi	File Nos. BR-890201XI BRH-890201XJ

For Renewal of License of
Stations WNAU(AM)/WWKZ(FM)
New Albany, Mississippi

MEMORANDUM OPINION AND ORDER

Adopted: January 30, 1992; Released: January 31, 1992

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration: (i) license renewal applications for the four captioned radio stations; (ii) a Petition to Deny timely filed on May 1, 1989, by the Mississippi State Conference of Branches of the National Association for the Advancement of Colored People (NAACP), various local NAACP branches and the National Black Media Coalition (*hereinafter* "NAACP/NBMC") against the above-captioned renewal applications;[1] (iii) oppositions from the licensees; and (iv) the licensees' responses to staff letters of inquiry.[2] NAACP/NBMC allege that the above-captioned stations violated the Commission's equal employment opportunity (EEO) Rule and policies. NAACP/NBMC request that the Commission investigate the licensees' employment practices. If the investigations reveal evidence that requires such action, NAACP/NBMC request that the Commission designate the renewal applications for hearing and deny the applications.

II. BACKGROUND

2. In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. Section 309(d)(1); *Astroline Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Application of Dubuque T.V. Limited Partnership and Sage Broadcasting Corporation of Dubuque, Iowa for Assignment of Television License for KDUB-TV, Dubuque, Iowa*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

3. The petition[3] did not include affidavits from any NAACP members in the service areas of the stations. Accordingly, we find that the petition to deny filed by the NAACP against the Mississippi stations is insufficient to establish standing and the petitioner will be considered an informal objector in accordance with 47 C.F.R. Section 73.3584(b). *See American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987).

4. The petition contained a statement under penalty of perjury from the chairman of the NBMC, Pluria W. Marshall, a resident of the Washington, D.C. area. However, the Commission has held previously that the statement of a person who does not claim to be a listener of the challenged station or a resident of its service area does not satisfy the standing requirements of the Act. *See Applications of Certain Broadcast Stations Serving Communities in the States of Michigan and Ohio*, 3 FCC Rcd 6944 (1988); *see also Application of KDEN Broadcasting Co. for Renewal of License of Station KDEN, Denver, Colorado*, 55 Rad.Reg. 2d (P&F) 1311, 1311-1312 (1984). Accordingly, we hold that NBMC lacks standing to petition against the Mississippi stations and we will treat its petition as an informal objection.

III. PLEADINGS

5. NAACP/NBMC derived their factual allegations from the licensees' EEO programs and annual employment reports. Review of their allegations led us to conclude that NAACP/NBMC presented a *prima facie* case demonstrating that, as to all four stations, unconditional grant of the renewal applications would have been inconsistent with the public interest. Section 309(d)(1) of the Communications Act, 47 U.S.C. Section 309(d)(1). *Astroline, supra.*[4] Further inquiry was, therefore, necessary. *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont*); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*).

6. Review of NAACP/NBMC's allegations as well as each licensee's renewal applications, oppositions and inquiry responses leads us to conclude that there are no substantial and material questions of fact warranting designation for hearing. In addition, we find no evidence that any licensee engaged in discrimination. Thus, grant of each application will serve the public interest. 47 U.S.C. Section 309(d)(2). *Astroline, supra.* Accordingly, we will grant renewal but with sanctions and remedies as follows.

IV. DISCUSSION

7. Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and

minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Sections 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080 (b) and (c).

8. When a renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), *petition for reconsideration pending*; *see also* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters). *See e.g., Beaumont, supra*; *Bilinqual, supra*.

WZRX(AM), Jackson, WSTZ-FM, Vicksburg

9. A review of the licensee's 1989 EEO Program Report, opposition and response to our letter of inquiry reveals that the licensee had 44 overall and 39 upper-level full-time hiring opportunities from January 31, 1986, through January 31, 1989.[5] The licensee did not start to maintain complete records of referrals until April 1988. The response to our inquiry reveals that the general recruitment sources contacted by the licensee and the numbers of minority referrals after April 1988 are: *Clarion Ledger* (11), two employment agencies (5), employee and other personal referrals (2), three colleges (0), Mississippi Employment Service (0), National Organization for Women (0), American Association of University Women (0), and an internship program that includes students from two colleges (1). The minority-specific sources contacted for the above positions and minority referrals are: Southern Technical College (4), Phillips Junior College (4), NAACP (0), Urban League (0), and the National Council of Negro Women (0). The licensee's records concerning minority applicants and interviewees are incomplete. The licensee provided records for only three of 13 full-time hires that occurred after April 1988. For these, the licensee interviewed 24 applicants, among whom were 16 Blacks (66.7%). The licensee implemented a system in 1988 to track and retain information on the race of applicants and referral sources of applicants. Of the licensee's 44 full-time hires, four (9.1%) were minorities -- all Blacks, two of whom were hired for upper-level positions (5.1% of 39 upper-level hires).[6]

10. NAACP/NBMC assert that the licensee used few general or minority-specific recruitment sources and received few referrals from sources. NAACP/NBMC also assert that the licensee appeared not to have records of contacting recruitment sources whenever job vacancies occurred and noted that the licensee hired two minorities out of 17 total hiring opportunities during the last 12 months of the license term.

11. In defense of its record, the licensee notes that it contacted five minority-specific sources and 11 general sources as well as evaluated its minority recruitment efforts and increased its sources. It also notes that, although it failed to maintain referral data until April 1988, its records reflect that it received 26 minority referrals in the nine-month period starting in April 1988. Also, the licensee indicates that it started an intern program at local colleges aimed at attracting minority students. The program led to the employment of a minority intern on a part-time basis. The licensee reports that, in late 1988, it started contacting three minority organizations and eight colleges, some of which have large minority enrollments. It states that it sends letters to these sources periodically regarding positions that come open at the stations. The licensee also reports that it has a written EEO policy which it distributes periodically to employees.

12. The licensee states that there were several reasons why it had deficient record-keeping and an incomplete EEO program at the beginning of its term. First, it had inexperienced management in place when it acquired the stations and had to hire a number of employees as "emergency" hires. Second, the licensee notes that although the stations were owned by a parent company that had broadcast experience, the corporate headquarters, located in Savannah, Georgia, inadequately supervised EEO. In March 1988, the licensee terminated its general manager and started keeping more complete recruitment data the following month. It hired a new general manager in September 1988, and again states that it assessed and revised its EEO program.

13. In view of the foregoing, we find no substantial and material question of fact warranting a hearing. We find no evidence indicating that the licensee engaged in discrimination. However, we are concerned that the licensee kept deficient records of EEO efforts until 10 months prior to the filing of the stations' renewal applications. Adequate records are essential for adequate self-assessment. We also are concerned because the licensee reports contacting recruitment sources only "periodically" instead of routinely for every hiring opportunity. We find this case similar to the record of KVII-TV, Amarillo, Texas, described in *Applications of Certain Broadcast Stations Serving Communities in the State of Texas*, 4 FCC Rcd 6685 (1989), where reporting conditions were imposed. Because the record of WZRX(AM)/WSTZ-FM is similar to that of KVII-TV, renewal with reporting conditions to monitor future performance is warranted.

WNAU(AM)/WWKZ(FM), New Albany

14. A review of the licensee's 1989 EEO Program Report, response to the petition to deny and response to our letter of inquiry reveals that the licensee had eight overall (seven upper-level) full-time hiring opportunities from December 3, 1986,[7] through February 1, 1989. The licensee used several general recruitment sources from which it received minority referrals: *Northeastern Mississippi Daily Journal* (4), on-air ads (1), employment agencies (7), employee referrals (1), non-employee referrals (0), walk-ins (0), two universities (0), and the Mississippi Employment Commission (0). The licensee did not contact any minority-specific sources until it revised its EEO program on January 1, 1989, noting that the general sources it contacted reach significant numbers of minorities. The licensee failed to maintain records of applicants and interviewees during the license term. The

licensee hired no minorities full-time during the license term but hired one Black part-time announcer three months before the term expired and offered him training to become a full-time announcer.[8]

15. NAACP/NBMC assert that the licensee has an unproductive, neutral EEO program devoid of minority-specific sources. They criticize the licensee for failing to hire minorities and for employing few minorities during the term.

16. The licensee asserts that it always has recruited minorities through a variety of sources but acknowledges that it failed to maintain recruitment records until establishing a written EEO program on January 1, 1989, one month before it filed for renewal. The licensee states that that there are several reasons why it has not always maintained an active EEO program. First, the licensee asserts that it inherited many problems with the stations from the previous licensee which it needed to correct before hiring new employees. Second, the licensee contends that it sought minority applicants but had difficulty competing for qualified minorities with other area radio stations that offered better pay. Third, the licensee states that it had no time at the beginning of its ownership to train new employees and if it had implemented an EEO program before correcting the technical problems it inherited it would have been "putting the cart before the horse." With regard to the EEO program in place since January 1989, the licensee states that it began using four minority organizations, two women's organizations, three colleges, two newspapers, five employment services and eight other sources that have significant minority representation. The licensee notes that because of the small minority labor force in its job market, it would need to hire only one minority full-time to meet Commission guidelines.[9]

17. In view of the foregoing, we find no substantial and material question of fact to warrant a hearing. In addition, we find no evidence indicating that the licensee engaged in discrimination. While there was a lack of record-keeping regarding applicants and interviewees, and a lack of information indicating active self-assessment until the last five months of the term, the licensee had only eight hiring opportunities over a two year, two month period of time. We also note that the licensee had no EEO program until one month before filing for renewal. The record of WNAU(AM)/WWKZ(FM) is comparable to the licensee's in *Application of CRB of Florida, Inc. for Renewal of License of Station WZZR(FM)*, 6 FCC Rcd 2303 (1991) (*WZZR(FM)*). In that case, the licensee maintained no recruitment records until the end of the term. Despite its failure to receive minority referrals from general recruitment sources, the licensee of WZZR(FM) contacted no minority sources until the end of the term. Like the licensee of WNAU(AM/WWKZ(FM), the licensee in *WZZR(FM)* had no EEO program until one month prior to filing for renewal. The licensee of WZZR(FM) received a forfeiture of $7,500. Therefore, we will renew WNAU(AM)/WWKZ(FM)'s licenses subject to a forfeiture for $7,500 for its violations of the Commission's EEO Rule, 47 C.F.R. Section 73.2080(5)(c)(2), (3) and (5), and will impose reporting conditions in order to assure that they continue their future affirmative action efforts and self-assessment.

V. CONCLUSION

18. After considering the evidence and arguments submitted by NAACP/NBMC and all licensees in the instant case, we find that no hearings are warranted and the records of the licensees support the granting of all of their renewal applications. However, because of concerns about future affirmative action efforts, reporting conditions will be imposed on each of the licensees. In addition, a forfeiture of $7,500 will be imposed on the licensee of WNAU(AM)/WWKZ(FM) for violations of the Commission's EEO Rule.

VI. ORDERING CLAUSES

19. Accordingly, *IT IS ORDERED* that the informal objection filed by the NAACP against Stations WZRX(AM)/WSTZ-FM and WNAU(AM)/WWKZ(FM) **ARE DENIED.**

20. IT IS FURTHER ORDERED that the informal objection filed by the NBMC against all stations in the instant case **IS DENIED.**

21. IT IS FURTHER ORDERED that the license renewal applications filed by Lewis Broadcasting Corporation for Stations WZRX(AM)/WSTZ-FM and filed by RadioSouth of Mississippi for Stations WNAU(AM)/WWKZ(FM) **ARE GRANTED** subject to the EEO reporting conditions specified herein.

22. IT IS FURTHER ORDERED, that, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, this document constitutes a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $7,500 for the licensee of WNAU(AM)/WWKZ(FM).

23. IT IS FURTHER ORDERED, that the licensees of Stations WZRX(AM)/WSTZ-FM and filed by WNAU(AM)/WWKZ(FM) file an original and one copy of the following information on February 1, 1993, February 1, 1994, and February 1, 1995:

(a) For each report, a list of all job vacancies during the twelve months preceding the respective reporting dates, indicating the job title and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[10]

(b) a list of employees as of the January 1, 1993, payroll period for the first report and as of the January 1, 1994, and the January 1, 1995, payroll periods for the second and third reports, by job title, indicating part-time or full-time status (ranked from the highest paid classification), date of hire, sex and race or national origin;

(c) details concerning the station's efforts to recruit minorities for each position filled during the period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

24. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order to all parties.

25. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch. Should the parties have any questions regarding this action, they may telephone the Mass Media Bureau's EEO Branch at 202-632-7069. Regarding the forfeiture proceedings for WNAU(AM)/WWKZ(FM), the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order and Notice of Apparent Liability. Any comments relating to its ability to pay should include those financial letters set forth in the noted attachment.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The Petition to Deny also included the following licensees: Fortune Media, Inc., licensee of WAKK(AM)/WAKH(FM), McComb, Mississippi (file nos. BR-890201VD and BRH-890201UZ), and Southern Starr of Mississippi, Inc., licensee of WKNN(AM)/WKNN-FM, Pascagoula, Mississippi (file nos. BR-890201XP and BRH-890201XS). On June 23, 1989, NAACP/NBMC withdrew their petition against WKNN(AM)/WKNN-FM and requested that the Commission renew the licenses without conditions. On November 29, 1990, the licensee filed an application for assignment of the license of WKNN(AM) to a new licensee. In earlier actions, the Commission renewed the AM station's license and approved its assignment. NAACP/NBMC withdrew their petition against WAKK(AM)/WAKH(FM) on July 18, 1989. However, as with all such cases, we have reviewed their EEO record, as well as that of WKNN-FM, and concluded that unconditional renewal was warranted for all three stations.

[2] On July 3, 1991, the Commission approved an involuntary transfer of control of the licenses of Stations WNAU(AM)/WWKZ(FM) from RadioSouth of Mississippi to Gary Stevens, receiver.

[3] NAACP/NBMC requested that the Commission investigate the stations' EEO performances in order to determine whether the licensees violated the Commission's EEO Rule. Moreover, they requested that, "if the evidence thereby elicited [by the investigations] so requires, the Commission should designate the applications . . . for hearing and thereafter deny the applications." Standing alone, a request for an investigation is not a petition to deny or informal objection against a license renewal. However, NAACP/NBMC included the Mississippi stations in a larger petition covering stations in several states in which they request in the first paragraph of the petition that the Commission designate all the "applications for evidentiary hearings and, based on the evidence expected to be adduced at these hearings, to deny the applications." Therefore, we will treat the challenge to the Mississippi stations as indicated in paragraphs 3 and 4 of this *Order*.

[4] The licensees were not challenged regarding their recruitment of women. Nonetheless, as is our practice in all cases, we reviewed each licensee's EEO efforts in this respect and found them sufficient.

[5] The licensee acquired the FM station on January 31, 1986, and the AM station on May 1, 1986.

[6] The labor force of the Jackson, Mississippi MSA is made up of 46.6% women, and 34.8% minorities (33.8% Black). Although the stations are licensed in Jackson and Vicksburg, Mississippi, the licensee reports that they are co-located in the Jackson area. In 1989, the licensee employed 15 employees overall (14 upper-level), including two (13.3%) minorities -- both Blacks in upper-level positions (14.3% of upper-level employees). In 1988, the licensee had 16 employees overall (13 upper-level), of whom two (12.5%) were minorities, both Blacks in lower-level positions. In 1987, the licensee had 17 employees overall (14 upper-level), of whom two (11.8%) were minorities, both Blacks in lower-level positions. In 1986, the AM station employed fewer than five full-time employees and the licensee failed to file an Annual Employment Report for the FM station. The licensee states that it prepared to file a late 1986 report for the FM station along with its renewal application. The licensee reports, however, that damage from an ice storm resulted in destruction of the 1986 records. Therefore, the licensee is unable to report the 1986 information.

[7] The licensee acquired the stations on December 3, 1986.

[8] Union County, Mississippi's labor force is 43.1% female and 13.9% minority (13.4% Black). The licensee employed no minorities full-time from the time it acquired the stations on December 3, 1986, through the end of the license term. In 1989, the licensee had 17 overall employees (16 upper-level). In 1988 and 1987, the licensee had 16 overall employees (11 upper-level).

[9] The licensee relies on the Mississippi Research and Development Center for labor force figures indicating that the minority labor force for Union County, Mississippi is 10.9% with projections that it will decline in 1990 Census figures and in 1995. However, the Commission relies on published Census figures -- not projections -- which indicate that the minority labor force for Union County is 13.9% (13.4% Black).

[10] Such a list might start:

(1) News Director: Officials and Managers; Full-time.

3 Applicants:	1 White female	A.W.R.T.
	1 Black male	Urban League
	1 Black female	NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League and NAACP.

Selected: Black male (8/19/91).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petitions for Waiver of
Part 69 of the Commission's Rules

Dedicated Network Access Lines,
Open Network Architecture

MEMORANDUM OPINION AND ORDER

Adopted: January 30, 1992; Released: January 30, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. In July 1991, the Commission adopted revisions to Part 69 of the Commission's Rules, specifying rate structure and other tariffing requirements to be used by Bell Operating Companies (BOCs) when implementing Open Network Architecture (ONA).[1] ONA requires BOCs to unbundle various access offerings into Basic Service Elements (BSEs) and Basic Serving Arrangements (BSAs).[2] In addition, the *Part 69 ONA Order* requires BOCs to offer one lineside and one trunkside switched access BSA. Additional switched access BSAs, or the unbundling of a switched access element other than an unbundling of a BSE, requires a Part 69 waiver.[3]

2. Several carriers are seeking waivers of the Commission's access rules to establish a separate element or subelement for dedicated channels between a customer's premises and a BOC central office that transmit network information or network control information between an enhanced service provider (ESP) and that BOC's network. Physically, these facilities are similar to facilities used to provide some special access services. Only certain specific BSEs are presently associated with such a channel.[4]

3. In the *Part 69 ONA Order*, the Commission stated that dedicated network access lines (DNALs) described in BOC ONA plans appear to require Part 69 waivers.[5] In the *Southwestern Bell LIDB Order* and the *GTE LIDB Order*, the Bureau examined rate structures for facilities similar to the channels described as DNALs in these petitions, and reached the same conclusions.[6] Specifically, at issue in those proceedings was the proper classification of the 56 kilobit per second (kbps) DS0 line used to connect an interexchange carrier's common channel signalling network to a local exchange carrier's common channel signalling network. The Bureau found that, since those facilities are "used to deliver, or facilitate the delivery of, switched access service," they should be tariffed as transport.

4. In the *Ameritech DNAL Waiver Order*, the Bureau adhered to the analysis originally announced in the *GTE LIDB Order* that facilities used to deliver switched services should be treated as transport.[7] The Bureau therefore granted Ameritech's request to waive the Commission's access rules to permit the establishment of transport subelements for Ameritech's DNALs. Following the *Ameritech DNAL Waiver Order*, several other BOCs filed petitions for waiver of the switched access rules to tariff DNALs used in conjunction with certain BSEs as separate elements or subelements.[8]

II. POSITIONS OF THE PARTIES

5. The BOCs request a waiver of Part 69 of the Commission's Rules to establish flat-rated subelements in the transport element for each DNAL to be used in conjunction with BSEs.[9] These BOCs argue that granting their waiver requests would be consistent with prior Bureau Orders, and would provide ESPs with the valuable capability to transmit information directly into the BOCs' networks.[10]

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[1] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and Order, Order on Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991) (*Part 69 ONA Order), petitions for recon. pending.* The BOCs' ONA plans had been previously approved. *See* Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 5 FCC Rcd 3103 (1990) (*ONA Amended Plans Order).* The BOCs are the Ameritech Operating Companies (Ameritech); the Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telephone Companies (BellSouth); New York Telephone Company and New England Telephone and Telegraph Company (NYNEX); Pacific Bell and Nevada Bell; Southwestern Bell Telephone Company (Southwestern Bell); and US West Communications, Inc. (US West).

[2] For a discussion of the definitions of "BSA" and "BSE", see Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 FCC Rcd 4524, 4525 (1991) (*Part 69 ONA Order).*

[3] *Part 69 ONA Order,* 6 FCC Rcd at 4527.

[4] The BOCs use the term dedicated network access line (DNAL) to describe these channels. The BSEs that can be offered in conjunction with a DNAL are Automatic Circuit and Trunk Monitoring; Calling Directory Number Delivery via Bulk Calling/Line Information Delivery (BCLID); Make Busy Key; Message Desk (SMDI); Message Waiting Indicator - Activation (Audible); Message Waiting Indicator - Activation (Visual); and Network Reconfiguration. Bell Operating Companies, ONA Services User Guide, July 31, 1991, at 101-12.

[5] *Part 69 ONA Order,* 6 FCC Rcd at 4527 n.29.

[6] *GTE LIDB Order,* 6 FCC Rcd at 6110; *Southwestern Bell LIDB Order,* 6 FCC Rcd at 6099.

[7] Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2, Ameritech Petition for Waiver of Part 69 of the Commission's Rules, Dedicated Network Access Lines, Open Network Architecture, DA 91-1629, released December 27, 1991 (Com.Car.Bur.) (*Ameritech DNAL Waiver Order).*

[8] The BOCs whose waiver petitions are now before us are Bell Atlantic, BellSouth, NYNEX, Southwestern Bell, and US West. No oppositions to these petitions have been filed.

[9] US West petitions to establish two rate elements for its DNAL. The first element would be a flat rated, distance sensitive rate element offered in four mileage bands (0-8; 8-25; 25-50; and over 50 miles), and the second element would be a flat non-distance sensitive DNAL termination charge. US West Petition at 4.

[10] Southwestern Bell Petition at 3; BellSouth Petition at 3; US West Petition at 4-5; Bell Atlantic Petition at 2.

III. DISCUSSION

6. Some of the BOCs seeking waivers would establish new subelements within the transport element for the provision of DNALs used in conjunction with BSEs.[11] These BOCs argue in their waiver petitions that the costs of these DNALs should be recovered on a flat, monthly basis.[12] Establishing separate subelements in these circumstances is consistent with the purposes of the access charge rules. Thus, the petitioners have shown good cause, within the meaning of Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, to establish access rate elements for these DNALs.[13] Establishing non-usage sensitive rates in the transport rate element would also require a waiver of the Order in the *Transport Rulemaking*.[14] In the *Ameritech DNAL Waiver Order*, we concluded that waiver of the *Transport Rulemaking* Order was in the public interest, as it would promote the Commission's goals embodied in the *Transport Rulemaking*.[15] We also note that the DNALs at issue here are for all practical purposes identical to those discussed in the *Ameritech DNAL Waiver Order*. Accordingly, for the reasons discussed in the *Ameritech DNAL Waiver Order*, we waive the requirements of the *Transport Rulemaking* Order to the extent necessary to enable the BOCs to tariff the DNALs used in conjunction with BSEs as separate transport subelements."[16] We note, however, that this waiver is subject to the Commission's ultimate decision in the *Transport Rulemaking* on the appropriate rate structure for transport.

IV. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the petitions for waiver of Part 69 of the Commission's Rules, filed by the Bell Atlantic Telephone Companies, BellSouth Telephone Companies, NYNEX Telephone Companies, Southwestern Bell Telephone Company, and US West Communications, Inc., to place the terms and conditions for their dedicated network access lines in the switched access section of their tariffs, ARE GRANTED.

8. IT IS FURTHER ORDERED that the petitions for waiver of Part 69 of the Commission's Rules listed above, ARE GRANTED, to the extent they establish subelements in the transport rate element for their dedicated network access lines.

9. IT IS FURTHER ORDERED that the petitions for waiver of Part 69 of the Commission's Rules listed above, ARE GRANTED, to the extent they establish dedicated network access lines as basic serving arrangements within the meaning of the Commission's *Part 69 ONA Order*, ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[11] *E.g.*, Southwestern Bell Petition at 3; US West Petition at 4.

[12] BellSouth Petition at 3; Southwestern Bell Petition at 4 n. 13; US West Petition at 4; Bell Atlantic Petition at 2.

[13] Southwestern Bell argues that DNALs are more properly classified as Special Access than Switched Access, and requests the right to withdraw its contingent waiver petition if the Commission or a reviewing Court reverses the Bureau's decision. Southwestern Bell Petition at 4. *See also* BellSouth Petition at 3; US West Petition at 3 n. 11; Bell Atlantic Petition at 1 n. 2. We will consider such requests if and when the need arises.

[14] MTS and WATS Market Structure, CC Docket No. 78-72, and Transport Rate Structure and Pricing, CC Docket No. 91-213, 6 FCC Rcd 5341 (1991) (*Transport Rulemaking*).

[15] *Ameritech DNAL Waiver Order*, at paras. 11-13.

[16] We also grant US West's petition to establish a distance-sensitive DNAL rate element and a non-distance-sensitive DNAL termination element.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Transmittal No. 435
Telephone Companies
Revisions to Tariff F.C.C. No. 4

ORDER

Adopted: January 31, 1992; Released: January 31, 1992

By the Chief, Common Carrier Bureau:

1. On October 29, 1991, BellSouth Telephone Companies (BellSouth) filed Transmittal No. 435 to specify that Calling Party Number (CPN),[1] currently available in all BellSouth states through the carrier's interstate access tariff, will be withdrawn in North Carolina. BellSouth will not again offer CPN to North Carolina subscribers until the North Carolina Utilities Commission (NCUC) resolves certain privacy issues regarding the delivery of CPN. BellSouth Description and Justification at 1. The tariff is scheduled to become effective on February 3, 1992. For reasons discussed below, we reject Transmittal 435.

2. On November 13, 1991, American Telephone and Telegraph Company (AT&T) filed a petition to reject Transmittal 435. AT&T argues that the restriction on CPN in North Carolina is unreasonable because it conditions the provision of interstate service on action in a state regulatory proceeding. AT&T Petition at 3-4. AT&T states that the Commission recognized in its current CPN proceeding that some state requirements governing caller ID service may hinder the ability of interstate access customers to use interstate caller ID. *Id.* at 4.[2] AT&T further asserts that the Commission has exclusive authority to regulate interstate communications and BellSouth's action to degrade its interstate access service by withdrawing CPN in North Carolina is contrary to Federal law. *Id.* at 3-4.

3. On November 25, 1991, BellSouth replied to AT&T. BellSouth states that Transmittal 435 is an interim measure pending resolution of interstate CPN issues in the Commission's CPN proceeding. BellSouth argues that the Common Carrier Bureau already denied a similar AT&T petition against a Pacific Bell tariff restricting CPN service in California because of state commission privacy concerns.[3] BellSouth Reply at 2. BellSouth contends that the Bureau should also reject AT&T's current argument against temporarily withdrawing CPN in North Carolina since AT&T can express its concerns about interstate CPN in the *Caller Number ID NPRM* proceeding. *Id.* BellSouth also maintains that Transmittal 435 will not affect AT&T's current Automatic Number Identification service arrangements. *Id.* at n. 1.

4. In Transmittal 435, BellSouth seeks to withdraw CPN in North Carolina after initially making it available to customers in that state.[4] Under Section 214(a) of the Communications Act, 47 U.S.C. § 214(a), a carrier must obtain Commission authority prior to discontinuing a service to a community.[5] However, BellSouth has not yet requested, nor obtained, the approval required by this provision of the Act for such a discontinuance. Therefore, we reject Transmittal 435 as patently in violation of Section 214(a) of the Act. Our ruling is limited to the Section 214(a) discontinuance issue and does not address the merits of BellSouth's arguments or those of AT&T in opposition.

5. Accordingly, IT IS ORDERED that BellSouth Telephone Companies Tariff F.C.C. No. 4, Transmittal No. 435, IS REJECTED.

6. IT IS FURTHER ORDERED that the petition to reject BellSouth Telephone Companies Tariff F.C.C. No. 4, Transmittal No. 435, filed by American Telephone and Telegraph Company, IS GRANTED.

7. IT IS FURTHER ORDERED that BellSouth Telephone Companies SHALL ISSUE revisions to the tariff no later than five business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice. For this purpose, Special Permission No. 92-67 is assigned and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived.

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[1] CPN, also named "caller ID," provides the called party with the capability to identify the ten-digit station number of the calling party.

[2] *Citing* Rules and Policies Concerning Calling Number Identification Service, Notice of Proposed Rulemaking, CC Docket No. 91-281, 6 FCC Rcd 6752, 6759 (1991) (*Caller Number ID NPRM*).

[3] *Citing* Pacific Bell, Revisions to Tariff F.C.C. No. 128, Transmittal No. 1543, 6 FCC Rcd 6069 (Com.Car.Bur. 1991).

[4] For this reason, BellSouth Transmittal 435 is distinguishable from the Pacific Bell transmittal cited by BellSouth, as well as from a similar Bell Atlantic transmittal. When first implementing CPN, Pacific Bell and Bell Atlantic chose not to introduce the service in California and Pennsylvania, respectively. These carriers, unlike BellSouth, did not offer the service to customers and then attempt to withdraw it. *See, e.g.*, Bell Atlantic Telephone Companies, Revisions to Tariff F.C.C. No. 1, Transmittal Nos. 410 and 428, 6 FCC Rcd 2907 (Com.Car.Bur. 1991) (CPN proposed for all states in Bell Atlantic region except for Pennsylvania because legality of CPN, under state law, subject of pending challenge in Pennsylvania Supreme Court).

[5] Section 214(a) states,

> No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby....

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Tariff F.C.C. No. 12 — Transmittal No. 3799

ORDER

Adopted: February 3, 1992; Released: February 3, 1992

By the Chief, Common Carrier Bureau:

1. On January 21, 1992, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective February 4, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined review procedures for certain tariff filings. This filing modifies Option 7 of Virtual Telecommunications Network Service (VTNS) by adding calling capabilities to and from Hungary; modifying the Domestic and International Usage Volume Pricing Plans; modifying the Minimum Annual Charge; and making other minor textual changes. AT&T Tr. No. 3799, Letter of Transmittal.

2. MCI Telecommunications Corporation filed a petition to reject the captioned tariff revisions, US Sprint Communications Company Limited Partnership filed a petition to reject or alternatively suspend and investigate, and the Competitive Telecommunications Association filed a petition to reject or, in the alternative, suspend and investigate Transmittal No. 3799 on January 28, 1992.

3. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3799 and the appropriate pleadings. We conclude that this transmittal must be rejected because these revisions substantially change Option 7, which includes inbound service, and are therefore inconsistent with the Commission's decision in CC Docket No. 90-132 to prohibit any further bundling of inbound services in Tariff 12 packages and in contract-based tariffs.[2]

4. Accordingly, IT IS ORDERED that American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3799, IS REJECTED.

5. IT IS FURTHER ORDERED that the petition to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3799 filed by MCI Telecommunications Corporation, the petition to reject or alternatively suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3799 filed by US Sprint Communications Company Limited Partnership, and the petition to reject or, in the alternative, suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3799 filed by the Competitive Telecommunications Association ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

6. IT IS FURTHER ORDERED that American Telephone and Telegraph Company SHALL ISSUE revisions to the tariff no later than five business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice. For this purpose, Special Permission No. 92-95 is assigned and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, *Report and Order*, FCC 91-251, 6 FCC Rcd 5880 (1991) (*IXC Order*), *reconsidered in part*, Memorandum Opinion and Order, FCC 91-390, Mimeo 38289, (released Nov. 25, 1991), *further recon. pending.*

[2] *See* American Telephone and Telegraph Company, Transmittal No. 3375, DA 91-1577 (Com.Car.Bur.) (released Dec. 19, 1991) at para. 11.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-376

In the Matter of

USA Payphone Systems

ORDER
(Proceeding Terminated)

Adopted: February 3, 1992; Released: February 4, 1992

By the Chief, Common Carrier Bureau:

1. On December 23, 1991, we released orders directing certain operator service providers (OSPs) to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On December 19, 1992, USA Payphone Systems (USAPS) filed revisions to its informational tariff which reduce its rates substantially. In an accompanying report of sample prices, USAPS states that its total charge for a sample eight-minute call would be $6.50. In a report filed September 23, 1991, USAPS stated that its total charge for the same call under the rates then in effect would be $9.00. This represents a reduction of almost 28 percent from the highest total charge USAPS reported in its September 23 report. It was on the basis of that report and the rates USAPS then had in effect that we found that USAPS's rates appeared to be unjust and unreasonable. USAPS no longer charges the rates that prompted this proceeding. USAPS therefore need not provide further justification for its rates and charges at this time and is not required to announce, at the beginning of each call that it handles, that its rates are available on request.[2] We hereby terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-376 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[1] *See, e.g.*, USA Payphone Systems, CC Docket No. 91-376, DA 91-1611, released Dec. 23, 1991 (Com.Car.Bur.).

[2] We emphasize that this Order does not represent an affirmative finding that USAPS's rates are just and reasonable.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-374

In the Matter of

Southeast Pay Telephone, Inc.

ORDER
(Proceeding Terminated)

Adopted: February 3, 1992; Released: February 4, 1992

By the Chief, Common Carrier Bureau:

1. On December 23, 1991, we released orders directing certain operator service providers (OSPs) to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On January 3, 1992, Southeast Pay Telephone, Inc. (SPT) filed revisions to its informational tariff which reduce its rates substantially. In an accompanying report of sample prices, SPT states that its total charge for a sample eight-minute call would be $6.58. In a report filed September 23, 1991, SPT stated that its total charge for the same call under the rates then in effect would be $7.56. This represents a reduction of almost 13 percent from the highest total charge SPT reported in its September 23 report. It was on the basis of that report and the rates SPT then had in effect that we found that SPT's rates appeared to be unjust and unreasonable. SPT no longer charges the rates that prompted this proceeding. SPT therefore need not provide further justification for its rates and charges at this time and is not required to announce, at the beginning of each call that it handles, that its rates are available on request.[2] We hereby terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-374 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[1] *See, e.g.*, Southeast Pay Telephone, Inc., CC Docket No. 91-374, DA 91-1609, released Dec. 23, 1991 (Com.Car.Bur.).

[2] We emphasize that this Order does not represent an affirmative finding that SPT's rates are just and reasonable.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Tariff F.C.C. No. 12 — Transmittal No. 3806

ORDER

Adopted: February 3, 1992; Released: February 4, 1992

By the Chief, Common Carrier Bureau:

1. On January 22, 1992, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective February 5, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined review procedures for certain tariff filings. This filing modifies Virtual Telecommunications Network Service (VTNS) by introducing a new optional feature called VTNS Split Access Flexible Egress Routing (VSAFER).

2. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3806. We conclude that this transmittal must be rejected because these revisions substantially change VTNS options which include inbound service and are therefore inconsistent with the Commission's decision in CC Docket No. 90-132 to prohibit any further bundling of inbound services in Tariff 12 packages and in contract-based tariffs.[2]

3. Accordingly, IT IS ORDERED that American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3806, IS REJECTED.

4. IT IS FURTHER ORDERED that American Telephone and Telegraph Company SHALL ISSUE revisions to the tariff no later than five business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice. For this purpose, Special Permission No. 92-96 is assigned and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, *Report and Order*, FCC 91-251, 6 FCC Rcd 5880 (1991) (*IXC Order*), *reconsidered in part*, Memorandum Opinion and Order, FCC 91-390, Mimeo 38289, (released Nov. 25, 1991), *further recon. pending*.

[2] *See* American Telephone and Telegraph Company, Transmittal No. 3375, DA 91-1577 (Com.Car.Bur.) (released Dec. 19, 1991) at para. 11.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-173

In re Applications of

COASTAL BROADCASTING PARTNERS	File No. BPCT-851206KE
CATALINA 54 BROADCASTING, LTD.	File No. BPCT-860207KJ
AVALON, CATALINA BROADCASTERS, INC.	File No. BPCT-860210KE
ES POSIBLE MINORITY MEDIA TELECOMMUNICATIONS, INC.	File No. BPCT-860210KH
GOLDEN SHORES BROADCASTING, INC.	File No. BPCT-860210KJ
Patrick D. Sisneros d/b/a CATALINA BROADCASTERS	File No. BPCT-860210KK
ISLAND BROADCASTING LIMITED PARTNERSHIP	File No. BPCT-860210KM
AVALON BROADCASTING	File No. BPCT-860210KN
David H. Wagner d/b/a DHW COMMUNICATIONS	File No. BPCT-860210KO

For Construction Permit for a New
Television Station, Channel 54
Avalon, California

MEMORANDUM OPINION AND ORDER

Adopted: February 3, 1992; Released: February 20, 1992

By the Commission:

1. There are nine competing applicants for a new television station on Channel 54 in Avalon, California. In an Initial Decision, released on March 15, 1989, Administrative Law Judge Edward Luton preferred Es Posible Minority Media Telecommunications over Coastal Broadcasting Partners, Catalina 54 Broadcasting, Avalon Catalina Broadcasting (ACB), Island Broadcasting Limited Partnership, Golden Shores Broadcasting, Catalina Broadcasters, Avalon Broadcasting, and DHW Communications based upon Es Posible's superior enhancement credits. *Coastal Broadcasting Partners*, 4 FCC Rcd 2345 (ALJ 1989).[1]

2. In a Decision, released on July 11, 1991, the Review Board reversed the ALJ's selection of Es Posible, holding that it deserved no credit for the integration of its sole voting stockholder, Rosemary Garcia. But it affirmed the ALJ's award of 100% quantitative integration credit to Island, Coastal Broadcasting, Catalina Broadcasters, and DHW, and concluded that Island was the superior applicant in terms of its qualitative enhancement credits. *Coastal Broadcasting Partners*, 6 FCC Rcd 4242 (Rev. Bd. 1991). Each of the losing applicants seeks Commission review of the Board's decision favoring Island.[2]

3. Based upon our review of the pleadings before us,[3] we reverse the Review Board's Decision and reinstate the ALJ's selection of Es Posible as the prevailing applicant.[4] As set forth below, we agree with the ALJ that Es Posible deserves 100% quantitative integration credit and that its proposal is qualitatively superior to the other proposals meriting 100% credit. Certain other aspects of the Review Board's Decision also warrant brief comment.

4. *Es Posible*: Organized as a corporation with both voting and non-voting stock, Es Posible seeks 100% credit for the proposed integration as full-time general manager of its sole voting stockholder, Rosemary Garcia. Garcia has a 51% equity interest in Es Posible; the remaining 49% equity is held by the corporation's only non-voting stockholder, Mateo R. Camarillo.

5. While pledging to serve as full-time general manager of the Avalon station, Rosemary Garcia has an interest in four McDonald's restaurant franchises. Despite Garcia's pledge to turn over her day-to-day responsibilities to others, the Board perceived a possible conflict between her full time integration proposal and her contractual obligations to McDonald's Corporation. In an order issued after Oral Argument, the Board directed Es Posible to submit copies of any license agreement between Garcia and McDonald's. *Coastal Broadcasting Partners*, 4 FCC Rcd 7512, 7513 ¶¶ 5-8 (Rev. Bd. 1989). For the reasons set forth below, we find that Es Posible has met its burden of adducing specific and credible evidence of how Rosemary Garcia will accommodate her existing franchise responsibilities.

6. Rosemary Garcia and her husband, Henry Garcia -- who has no ownership interest in or employment obligation to Es Posible -- jointly own four McDonald's restaurant franchises. Anticipating her full time integration commitment to Es Posible, Ms. Garcia hired her daughter to work full time at the restaurants in 1986. This reduced from 40 to 25 the average number of hours that Ms. Garcia has devoted to managing the restaurants each week. If Es Posible's application is granted, Garcia will further reduce her commitment to the restaurants by turning over her check signing, pension fund management, as well as other significant financial responsibilities to her husband, and the remainder of her current duties to her daughter, a full time restaurant employee (Tr. 1469). Acknowledging that she still must attend semi-annual Board Meetings at each restaurant and participate in major business decisions, Garcia claims that the transfer of duties will reduce the time spent on restaurant business to only a few hours a month (Tr. 1472).

7. To support this pledge, Es Posible submitted a statement under penalty of perjury from Henry Garcia, who states that he has no other business interests except the McDonald's restaurants, that he currently devotes an average of five or six hours a day to their management, that he is prepared to devote the additional time necessary to assume his wife's current restaurant duties, and that there is no impediment that would prevent him from doing so. Citing *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948 (Rev. Bd. 1988), the Board held, however, that Es Posible had not met its burden of showing a reasonable likelihood that Rosemary Garcia would be able to effectuate her full time commitment to Es Posible in light of her obligations to McDonald's. In *Washoe Shoshone*, the Board rejected the integration proposal of an individual who, like Rosemary Garcia, had signed a franchise contract with McDonald's obligating him to "personally devot[e] . . . his full time and best efforts to the operation of the Restaurant . . . [and to] keep free from conflicting enterprises or any other activities which would be detrimental to or interfere with the business of the Restaurant."

8. We disagree with the Review Board that *Washoe Shoshone* mandates the rejection of Rosemary Garcia's integration proposal. As Es Posible urges, there is a critical factual distinction between this case and *Washoe* in that Es Posible has met its burden of adducing specific and credible evidence of Ms. Garcia's current time commitments and of how she will accommodate those responsibilities with her full time integration proposal. In this regard, the franchise agreement in both cases explicitly provided that "in case more than one individual has executed this License as the Licensee, at least one individual shall devote his full time and best efforts to the operation of the Restaurant." In *Washoe Shoshone* the individual proposing full time integration was the only "Licensee" of the McDonald's franchise and he was therefore personally obligated to devote his "full time and best efforts" to the restaurants. In fact, he proposed to continue managing the McDonald's restaurants while at the same time devoting "full time" to managing a broadcast station. Here, however, both Henry and Rosemary Garcia signed the franchise agreements, and Rosemary Garcia proposes to diminish greatly her commitment to the restaurants. In particular, Es Posible has provided specific and credible evidence explaining how Ms. Garcia will reduce her involvement to only a few hours each month by turning over her current duties to her husband and daughter.

9. In accordance with the provision specifying that "at least one licensee shall devote his full time and best efforts to the operation of the Restaurant," the Garcias propose that Henry Garcia -- who has absolutely no obligation to Es Posible or other commitments preventing him from devoting full time to the restaurants -- will assume the contractual responsibilities for the restaurants, thereby freeing Rosemary Garcia to fulfill her integration pledge. In our view, this plan comports with the plain meaning of the McDonald's franchise agreement -- i.e., that *either* licensee may fulfill the best efforts clause. Since there is no evidence that Henry Garcia will be unable to devote full time to the restaurants, we cannot agree with the Board (6 FCC Rcd at 4244 ¶ 7), that there is a "facial conflict" between Rosemary Garcia's contractual obligations and her integration proposal. Thus, there is no reason for Es Posible to present affirmative evidence that this arrangement satisfies McDonald's.[5] Nor was it required, as the Board inexplicably suggests (6 FCC Rcd 4243 ¶ 6), to show that the Garcias intended all along (and that McDonald's understood) that Henry Garcia was to be the "sole active franchisee." Rather, specific and credible evidence describing Ms. Garcia's current duties at the four franchise restaurants and explaining how those duties can be carried out by others in the future was sufficient to meet Es Posible's burden of showing that Ms. Garcia will be able to effectuate her full-time integration proposal. *See Fresno FM Limited Partnership*, 6 FCC Rcd 6998, 7000 ¶ 13 (1991), citing *Bradley, Hand & Triplett*, 89 FCC 2d 657, 660 ¶ 4 (Rev. Bd. 1982).

10. Having found that Es Posible has met its burden on the effectuation issue, we turn to the various claims that Es Posible would not be entitled to 100% quantitative integration credit, even if there were no problems as to Garcia's ability to effectuate her proposal. Since the Board concluded that Es Posible had not met its burden of showing that Ms. Garcia would be able to effectuate her integration proposal, it had no reason to consider these arguments. As set forth below, we find that Es Posible's ownership structure reliably reflects the manner in which control will be exercised and that there is no evidence belying Camarillo's claimed passivity that would require the attribution of his 49% non-voting stock. We therefore award 100% quantitative credit for Rosemary Garcia's proposed integration.

11. First, we reject the claim that Es Posible's ownership structure was fatally indefinite on the B cut-off date. Filed with the state of California on March 26, 1986 (five days before the last date for amending as a matter of right), Es Posible's Articles of Incorporation did not identify its equity owners or state that Mateo Camarillo had only a purely passive interest. But Commission precedent at the time that Es Posible filed its application did not require that it have written documentation of its organizational structure on the B cut-off date. *Evergreen Broadcasting Company*, 6 FCC Rcd 5599, 5599 & 5606 ¶ 6 & n.9 (1991). Nor are we persuaded to reject Es Posible's proposal based on a document filed with the State of California on April 29, 1986 listing both Rosemary Garcia and 49% non-voting stockholder Mateo Camarillo as directors. As DHW alleges, Camarillo's position as a corporate director would ordinarily make his equity interest attributable for integration purposes.[6] Garcia testified, however, that she never intended that Camarillo be a director, that she did not remember filling out the document listing him as a director, and that she had prepared that document during a period of great personal stress (Tr. 1462-64, 1601-02).[7] She further testified that she did not realize that she had listed Camarillo as a director until she had occasion to review the document while preparing for depositions, and that she notified the State of California of her mistake as soon as she discovered it (Tr. 1463, 1610; Es Posible Exh. 4). In accordance with her testimony that she would appoint a second director, tr. 1442, Es Posible filed a section 1.65 amendment on December 10, 1987 reporting the selection of her daughter as the second director. (Under state law Es Posible must have two directors, but it imposes no penalty for maintaining a vacancy on the Board of Directors.[8])

12. There is no evidence of activity by Camarillo during his brief stint as a "director" that belies his claimed passivity or otherwise undermines Garcia's testimony that she never intended to appoint, and did not realize that she had inadvertently named, Camarillo as a director of Es

Posible on the form filed with the state. Indeed, Garcia testified that Camarillo was not even aware of his "appointment" as a director (Tr. 1465).[9] Thus, the record as a whole supports Es Posible's claim that its owners never meant for Camarillo to be a director, and that he was a "director" only on paper. Under these circumstances, it is appropriate to disregard Camarillo's "appointment" as director for integration purposes and not to treat the January 19, 1987 deletion of Camarillo's name from the state filing as an impermissible comparative upgrade after the last date for amending applications as a matter of right. In doing so, we do not depart from our "no material involvement" standard, which provides that interests held by a director are fully attributable for integration purposes, regardless of any actual involvement by that director or how temporary his position.[10] We simply find that when a passive owner is inadvertently identified as a director in documents required by state law, when the mistake was unilaterally corrected once discovered, and when nothing in the record undermines the applicant's claim of inadvertence, the error will not be held against the applicant.[11] In so holding, we caution that each of these components is crucial to our determination not to treat Camarillo as a director for integration purposes.

13. Second, we disagree that Camarillo's pre-formation activities belie his status as a passive owner, whose interest may be disregarded under *Anax Broadcasting*, 87 FCC 2d 483, 488 (1981). The competing applicants urge that Camarillo first learned of the opportunity to apply for the Avalon station and that he recruited his long-time friend and associate, Rosemary Garcia, for that venture (Tr. 1408, 1412). They dispute the claim that Garcia actively negotiated the ownership structure, whereby she got 100% of the voting stock (51% equity interest) and was legally obligated to contribute 51% of the applicant's costs. They cite Garcia's testimony that Camarillo went along with the ownership structure she had suggested because it was identical to the structure that he had adopted for other applications (Tr. 1414-15, 1483, 1486). During an initial meeting with Garcia, Camarillo recommended two attorneys, one of whom was ultimately hired by Garcia (Tr. 1416), gave Garcia cost estimates that he had prepared (Tr. 1428), and turned over all the information he had about the proposal so that she could make an informed choice as to whether to apply for the Avalon station. By the same token, they note that she played no role in hiring the engineer or in selecting the transmitter site (Tr. 1417-18, 1467).

14. To the extent that the competing applicants rely on the pre-formation record and the circumstances surrounding the applicant's formation, we explained in *Evergreen*, 6 FCC Rcd at 5601 ¶¶ 14-16, that the post-formation record is ordinarily the best evidence of who will control the ongoing licensee. Thus, the manner in which the applicant was formed and the principals' pre-formation activities are probative only if the post-formation record is inconclusive as to who will control the ongoing licensee. Based upon our review of the record in this case, we find that neither the pre-formation record nor the circumstances relating to the applicant's formation have probative significance because the post-formation record reliably demonstrates that, in accordance with her formal status as Es Posible's only voting stockholder, Garcia will have exclusive managerial control over the applicant.[12]

15. In *Susan M. Mulkey*, 4 FCC Rcd 5520 ¶¶ 6-8 (1989), we fully credited a 10% voting stockholder's integration proposal, despite the 90% non-voting stockholder's pre-formation involvement in prosecuting the application. We did so because, following the applicant's organization as a two-tiered corporation, the voting stockholder became responsible for and did in fact prosecute the application, whereas the non-voting stockholder's involvement ended. As in *Mulkey*, it is clear that, once Rosemary Garcia agreed to join Mateo Camarillo in applying for the Avalon station, Ms. Garcia took an active role in prosecuting the application, and Camarillo ceased to be involved. The record reflects that Garcia has had only very limited contact of any kind with Camarillo since the application was filed (Tr. 1424). They met briefly in May 1986 when both attended a conference for McDonald's franchisees, and at that time Garcia apprised Camarillo of the application's progress (Tr. 1424-25). In addition, Es Posible's counsel sent Camarillo carbon copies of all materials that Garcia received (Tr. 1424-25). But there is no evidence of any communication from Camarillo to either Garcia or her attorney that would undermine Garcia's exclusive managerial authority over the applicant.

16. In this regard, Garcia personally handled all matters except those involving dealings with the engineer and questions pertaining to the selection of a site, which she delegated to communications counsel (Tr. 1417, 1467).[13] She worked by telephone with communications counsel in preparing Es Posible's application, and she personally researched its EEO proposal (Tr. 1418, 1428). With the attorney's help, she also drafted Es Posible's Articles of Incorporation (Tr. 1501).[14]

17. To the extent that the competing applicants fault Garcia for not opening a corporate bank account until October 1986, the post-formation record reflects that she has had exclusive control over Es Posible's finances. Garcia set up, and is the only one authorized to write checks on, that account; the bank statements are sent directly to her, and the checkbook is kept at her house (Tr. 1599). Before opening the account, Garcia paid the bills out of her personal accounts, including legal and engineering fees (Tr. 1461, 1570). In doing so, she kept careful records of her contributions and those of Camarillo, determined how each bill would be paid (Tr. 1599-1600), and instructed Camarillo to pay various amounts that he owed as the 49% investor (Tr. 1424, 1461-62). While Camarillo did, as the competing applicants allege, pay one engineering bill directly, he did so at Garcia's express direction (Tr. 1461-62; 1571). Indeed, it was not Camarillo but Garcia who covered any temporary imbalance in the accounts, even if this required contributions in excess of her 51% share (Tr. 1461, 1571).

18. In view of the foregoing, we find that Es Posible has met its burden of demonstrating that its sole voting stockholder will be able to effectuate her integration proposal, that Es Posible's ownership structure was not fatally indefinite on the B cut-off date, that its ownership structure reliably reflects the manner in which control will be exercised, and that Camarillo's 49% interest is not attributable for integration purposes. We therefore reinstate the ALJ's award of 100% quantitative integration credit to Es Posible.

19. We find for the reasons set forth below that Es Posible prevails over Island in terms of qualitative enhancements. We therefore need not determine whether the other applicants are correct that Island's 100% in-

tegration proposal should not have been credited because none of Island's principals made an explicit pledge in Island's direct written case to terminate their present positions at nearby broadcast stations.[15] Accordingly, we dismiss as moot Island's Petition for Leave to Amend, and Catalina 54's Motion to Strike, which relate to this employment question. But we take this opportunity to announce, in light of the litigation engendered with respect to these existing broadcast positions, our belief that the more efficient approach would be to require, as we do for all employment other than local broadcast employment, that the record contain an explicit pledge to terminate any conflicting local broadcast employment of indeterminate length. Thus, for evidentiary hearings held in the future, we will make no inference as to a local broadcaster's existing employment, and we will discredit his integration proposal unless there is an explicit pledge in the hearing record that that owner will terminate or reduce such employment. *See Woods Communications Group, Inc.*, FCC 91-422 ¶¶ 12-18 (released January 9, 1992) (where we discredited the integration proposal of an owner who pledged to work 40 hours per week but did not explicitly pledge to terminate or reduce her full time teaching position).

20. Turning to the qualitative enhancement factors, we find that Es Posible is qualitatively superior to the applicants awarded 100% quantitative integration credit by the Review Board (6 FCC Rcd at 4247-48 ¶¶ 20-25). Each of those applicants is 100% minority owned, as is Es Posible. Es Posible's integration proposal is also enhanced by 100% service area residence-civic participation, 100% future local residence, and 100% female ownership. Due to Rosemary Garcia's continuous residence in the service area for 37 years and her extensive participation in a wide variety of civic activities during that time, Es Posible merits a decisional advantage on the residence and civic participation factor.

21. Of the four applicants awarded 100% quantitative integration credit by the Board,[16] Catalina Broadcasters and Island are the only ones offering both future local residence and past service area residence-civic participation.[17] In addition to 100% minority ownership, Catalina's only enhancement credit is for past and future residence and civic participation. In contrast, the proposals of Es Posible and Island are also enhanced by female ownership and/or broadcast experience (4 FCC Rcd at 2364 ¶¶ 211, 213, 2355 ¶¶ 108-13).[18] Characterizing Catalina's civic participation as "scant," the ALJ properly ranked Catalina third behind Es Posible and Island (*Id.* at 2364-65 ¶¶ 212, 216).

22. The ALJ ranked Island, which offers quantitatively less than Es Posible's 100% residence and civic participation and "slight" rather than "extensive" civic participation, second behind Es Posible (*Id.* at ¶¶ 213, 216).[19] In doing so, the ALJ awarded Es Posible a moderate enhancement and Island a slight-to-moderate enhancement on the combined residence and civic participation factor (*Id.* at ¶ 215).[20] In our view, the ALJ understated somewhat the disparity between the applicants on this factor. Of Island's three general partners, two have resided in the service area for more than a brief period and one has participated in civic activities in the service area. In contrast, Es Posible's controlling owner offers both residence and civic participation in the service area. This quantitative disparity (100% vs. 66.7%/33.3%), standing alone, gives Es Posible an advantage on the combined residence and civic participation factor. That advantage is increased because Es Posible's controlling owner offers longer service area residence[21] and more extensive civic participation[22] than do Island's principals. Considering its superiority over Island on each of these criteria, Es Posible has at least a moderate overall advantage on the combined residence and civic participation factor.[23]

23. As the Board noted (6 FCC Rcd at 4246 ¶ 15), however, the ALJ found that all three of Island's partners were experienced broadcasters (4 FCC Rcd at 2355 ¶¶ 108, 110, 113) but inexplicably omitted this enhancement in ranking it behind Es Posible. We agree with the Board that Island is entitled to enhancement credit for broadcast experience (6 FCC Rcd at ¶ 15). While this restored credit narrows Es Posible's qualitative edge, Island's advantage on broadcast experience (100% vs. 0%) does not offset Es Posible's advantage on the factor of service area residence and civic participation (100% vs. 66.7/33.3%). The *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965), accords greater weight to local (or area) residence and civic participation than to previous broadcast experience. Enhancement credit for broadcast experience has only minor significance because emphasizing this factor could discourage qualified applicants from applying for a broadcast station, and because experience generally confers only an initial advantage. *See Kennelwood Broadcasting Company*, FCC 92-2 ¶ 4 (Jan. 21, 1991). In contrast, long-term residence and civic participation reflects a continuing knowledge of an area's changing needs and interests that is not as readily acquired by an area newcomer. Accordingly, Es Posible's advantage on the combined residence and civic participation outweighs Island's advantage on the considerably less important factor of broadcast experience.[24] In addition, Es Posible has a slight preference over Island because it is 100% female owned whereas Island is 66.7% female owned. This is a separate and distinct enhancement factor further strengthening Es Posible's comparative superiority.

ORDERS

24. ACCORDINGLY, IT IS ORDERED, That the Request for Leave to File Its Application for Review Late, filed September 3, 1991 by Golden Shores, and the Petition For Leave To File Late Pleading, filed August 15, 1991, by Avalon Broadcasting ARE DENIED for lack of good cause; that the Application for Review, submitted for filing on August 14, 1991, by Avalon Broadcasting IS DISMISSED as untimely; and that the following pleadings ARE DISMISSED as moot: (a) the Motion to Strike [Golden Shores' Consolidated Briefs and Application for Review], filed August 23, 1991, by Catalina 54; and (b) Petition to Dismiss [Avalon Broadcasting's and Golden Shores'] Applications, filed August 23, 1991, by Catalina 54.

25. IT IS FURTHER ORDERED, That the Motion to Strike Exhibit A of Es Posible's Application for Review, filed August 16, 1991, by Catalina 54 IS DISMISSED as moot.

26. IT IS FURTHER ORDERED, That the Petition for Leave to Amend, filed August 27, 1991, by Island and the Motion to Strike the attachment to Island's Consolidated Opposition, filed September 6, 1991, by Catalina 54 ARE

DISMISSED as moot; and that the Motion for Leave to Amend, filed January 17, 1992, by Es Posible IS GRANTED and the attached amendment IS ACCEPTED.[25]

27. IT IS FURTHER ORDERED, That, pursuant to 47 C.F.R. § 1.115 of the rules, the application for review, filed on August 12, 1991, by Es Posible IS GRANTED in part; that the applications for review filed on August 12, 1991, by Coastal Broadcasting, DHW, ACB, Catalina 54, and Catalina Broadcasters ARE DENIED; that the decision in *Coastal Broadcasting Partners*, 6 FCC Rcd 4242 (Rev. Bd. 1991) IS MODIFIED as reflected herein.

28. IT IS FURTHER ORDERED, That the application filed by Es Posible Minority Media Telecomunications, Inc. (File No. BPCT-860210KH) IS GRANTED; and that the applications filed by Coastal Broadcasting Partners (File No. BPCT-860206KE), Catalina 54 Broadcasting, Ltd. (File No. BPCT-860207KJ), Avalon Catalina Broadcasters, Inc. (File No. BPCT-860210KE), Patrick D. Sisneros d/b/a Catalina Broadcasters (File No. BPCT-860210KK), Island Broadcasting Limited Partnership (File No. BPCT-860210KM), and David H. Warner d/b/a DHW Communications (File No. BPCT-860210KO) ARE DENIED.[26]

FEDERAL COMMUNICATIONS COMMISSION2

Donna R. Searcy
Secretary

FOOTNOTES

[1] The ALJ disqualified a tenth applicant, Christine E. Shaw, who later dismissed her application.

[2] Pending before the Commission are: *(a)* applications for review, filed on August 12, 1991 by DHW, Es Posible, Coastal Broadcasting, Catalina 54, ACB, and Catalina Broadcasters, and on August 14, 1991 by Avalon Broadcasting; *(b)* oppositions, filed August 27, 1991, by Catalina Broadcasters, Es Posible, Coastal Broadcasting, ACB, and DHW; *(c)* consolidated opposition to applications for review, filed August 27, 1991, by Island; and *(d)* Response, filed October 4, 1991, by Golden Shores. Golden Shores claims to have filed an application for review on August 13, 1991. However, we have no record of such a filing, and, despite being given an opportunity to substantiate its alleged filing, Golden Shores has not submitted probative evidence verifying that its application for review was actually delivered to the Commission. *See Order*, FCC 91I-065 (released Sept. 30, 1991). To support its claimed filing, Golden Shores relies on a Federal Express letter documenting delivery to the Commission on August 14, 1991 of a package entrusted to Federal Express by Golden Shores' attorney and identified by a particular package tracking number. But there is no evidence that the document identified by that number was in fact Golden Shores' application for review.

[3] In addition to the pleadings listed in note 2 above, the following matters are pending before the Commission: *(a)* motion to strike Exhibit A of Es Posible's application for review, filed August 16, 1991, by Catalina 54, an opposition, filed August 27, 1991, by Es Posible, and a reply, filed September 6, 1991, by Catalina 54; *(b)* a petition for leave to amend, filed August 27, 1991, by Island, an opposition, filed September 6, 1991, by Catalina 54, and comments, filed September 9, 1991, by Catalina Broadcasters; *(c)* a petition for leave to file late pleading, filed August 15, 1991, by Avalon Broadcasting and an opposition, filed August 23, 1991, by Catalina 54; *(d)* a motion to strike attachment to Island's consolidated opposition, filed September 6, 1991, by Catalina 54 and comments, filed September 16, 1991, by Island; *(e)* petition to dismiss [Golden Shores' and Avalon Broadcasting's] applications, filed August 23, 1991, by Catalina 54; *(f)* a motion to strike [Golden Shores' Consolidated Briefs and Application for review], filed August 23, 1991, by Catalina 54 and an opposition, filed September 3, 1991, by Golden Shores; *(g)* a petition for leave to file its application for review late, filed September 3, 1991, by Golden Shores and an opposition, filed September 17, 1991, by Island; and *(h)* a motion for leave to amend, filed January 17, 1992, by Es Posible.

[4] In pleadings filed on August 15, 1991 and September 3, 1991, respectively, Avalon Broadcasting and Golden Shores request that we accept their late-filed applications for review. To justify its late-filed application for review, Avalon recites that, due to an error by his support staff, its attorney was not aware of the filing deadline until August 14, 1991. Golden Shores claims that it talked to a Review Board staff member, who indicated that the application for review was due on August 14, 1991. But, as reflected in n.2 above, Golden Shores has not established that it filed an application for review with the Commission.

Under 47 C.F.R. § 1.46(a) of the rules, the Commission does not routinely grant requests for extensions of time, and it has emphasized that such requests should be scrutinized to determine if they are based on a clear showing of good cause. *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 172 n.34 (1991). Consistent with that standard, we would not grant either Golden Shores or Avalon an extension of time for filing their applications for review based on the circumstances alleged here. To expedite our hearing processes, we intend to adhere strictly to the filing deadlines specified in *Hearing Reform* in future cases, and we will not hesitate to dismiss an applicant that cannot show good cause for not meeting prescribed filing deadlines. *See Comuni-Centre Broadcasting v. FCC*, 856 F.2d 1551, 1554-56 (D.C. Cir. 1988), cert. denied, 489 U.S. 1083 (1989), where the court upheld the dismissal of an application for failure to file proposed findings of fact and conclusions of law within the time prescribed by the ALJ.

For these reasons, the requests of Avalon Broadcasting and Golden Shores are not supported by good cause and will be denied. Based on the entire record before us, we find no reason to review on our own motion the Board's decision with respect to Avalon Broadcating and Golden Shores; thus, the Board's denial of those applications is final. We therefore dismiss as moot Catalina 54's August 23, 1991 pleadings, which request that we strike Avalon Broadcasting's late-filed application for review and that we dismiss for failure to prosecute Golden Shores' and Avalon's applications.

[5] Attached to Es Posible's Application for Review is a letter, dated July 30, 1991, from William Marble, Regional Vice President of McDonald's Corporation, offered in support of Rosemary Garcia's claimed time commitment to the proposed station. On August 16, 1991, Catalina 54 moved to strike the letter. In view of our finding that, without regard to the Marble letter, Es Posible has met its burden of showing that it is entitled to full credit for Rosemary Garcia's integration proposal notwithstanding her contractual obligations to McDonald's, Catalina 54's Motion to Strike is moot and will be dismissed.

[6] *Doylan Forney*, 5 FCC Rcd 5423, 5425 ¶¶ 16-17 (1990), affd sub nom. mem. *Maricopa Media v. FCC*, No. 90-1456 (D.C. Cir. Oct. 7, 1991); *Evergreen Broadcasting Co.*, 6 FCC Rcd 5602-03 ¶ 25 & n.27 (Sept. 20, 1991) ("positions as secretary/director,

standing alone violate the 'no material involvement' standard necessary to avoid attribution for comparative purposes of an equity interest held by a purportedly passive owner").

[7] Rosemary Garcia testified that during this period her 27 year old niece was diagnosed as having terminal cervical cancer (Tr. 1463). By this action we do not intend to suggest that an applicant's "great personal stress" is sufficient, standing alone, to relieve it of the consequences of its conduct in the absence of a showing that such conduct was inadvertent and that the evidence taken as a whole does not show otherwise.

[8] In accordance with California State law, Es Posible's Bylaws require that the corporation have two directors. The competing applicants urge that this requirement dilutes Roesmary Garcia's authority to manage the corporation, thus requiring a reduction in Es Posible's quantitative integration credit. However, the appointment of a second director would affect Es Posible's integration credit only to the extent that the second director had an ownership interest in the applicant or his involvement indicated that he was an undisclosed owner under *Royce International Broadcasting*, 5 FCC Rcd 7063, 7064 ¶ 10 (1990). As the competing applicants do not allege that under California state law the directors must own corporate stock, the requirement that Rosemary Garcia name a second director does not affect Es Posible's integration credit. Moreover, as the only voting stockholder, she has authority to remove the second director *without cause* under Article 3.8 of the Articles of Incorporation.

[9] Even if aware of his appointment as a director, Camarillo would not have been able to interfere with Garcia's exclusive managerial control in that Article 3.8 of the Articles of Incorporation accords voting stockholders the right to remove directors *without* cause. This provision comports with state law. Cal. Corp. Code § 303 (Deering 1987). This distinguishes this case from those holding that a purportedly passive owner's legal authority to influence the nominally active owner requires attribution regardless of whether such authority was ever exercised. *Evergreen Broadcasting Co.*, 6 FCC Rcd 5600 ¶¶ 7-10.

[10] The circumstances set out above distinguish this case from *Magdalene Gunden Partnership*, 6 FCC Rcd 5976, 5977 n.2 (1991). There, we refused to disregard an individual's role as a director even though his service as a director was brief and entailed only ministerial activities. Significantly, the applicant in that case disputed neither the individual's status as a director nor his law firm's service as legal counsel for the applicant. Because there is no evidence of any post-formation activity by Camarillo, this case is also distinguishable from *Coast TV*, 5 FCC Rcd 2751 (1990), where we attributed for integration purposes the interest of an owner who remained active for three weeks after being held out as a passive owner.

[11] *See* generally *Marlin Broadcasting of Central Florida*, 5 FCC Rcd 5751 (1990), affirmed, No. 90-1505 (D.C. Cir. decided January 7, 1992), where we did not consider for integration purposes an owner's formal designation as a limited partner that was made solely to satisfy a technical requirement under state law.

[12] We emphasize that Camarillo's involvement predated the filing of Es Posible's Articles of Incorporation with the state of California on March 26, 1986. Even if we were to consider these matters further, the pre-formation record and the circumstances surrounding the applicant's formation are far more favorable than those presented in *Evergreen Broadcasting Co.*, 6 FCC Rcd at 5602 ¶¶ 21-24, where we discredited the proposed integration of three general partners because the allegedly passive 49% limited partner had clearly "given away the store" to virtual strangers who contributed only $100 in exchange for their controlling interest. Not only are Garcia and Camarillo long-term business associates and friends, but they signed commitment contracts obligating Garcia to contribute 51% of the expenses and Camarillo to contribute 49% of the applicant's expenses (4 FCC Rcd at 2350 ¶ 56). While Camarillo promoted the proposal, Garcia investigated the project thoroughly before deciding to join Camarillo in applying for Avalon. Compare *Fresno FM*, 6 FCC Rcd ¶ 5 (1991); *Poughkeepsie Broadcasting*, 6 FCC Rcd 2497, 2498 ¶ 6 (1991). Finally, contrary to the competing applicants' suggestion, Camarillo is not an experienced broadcaster, only the co-owner of a station not yet on the air (Es Posible Ex. 3 at 1).

[13] While Camarillo recommended the counsel that Garcia ultimately hired, there is no evidence of a close association between counsel and Camarillo that undermines the claim that Garcia has exclusive authority over the applicant. Nor is that claim belied by the relationship between Garcia and counsel. Except in the case of engineering matters, Garcia worked closely with the attorney; she consulted him in making decisions, but did not simply defer to his judgment. These facts distinguish this case from others that rejected as inherently unreliable the proposed integration of a nominal owner who exercised no independent judgment and who would not exercise exclusive control over the applicant. *See Poughkeepsie Broadcasting Limited*, 6 FCC Rcd 2497 (1991); *Fresno FM*, 6 FCC Rcd 6998 (1991), petition for reconsideration pending.

[14] In addition, Garcia hired consultants to make detailed cost estimates (Tr. 1443-44) and maintained the corporate records and books (Tr. 1512, 1599).

[15] Two of Island's three "integrated" owners testified on redirect that each would relinguish her current position; the third owner did not disclose his plans with respect to his current broadcast employment. Citing *Rahu Broadcasting*, 56 RR 2d 285 (Rev. Bd. 1984), Island urges that the Board properly inferred that they would resign these positions since their current employers would hardly tolerate their management of a competing broadcast station. It also relies on *Kennebec Valley Television*, 2 FCC Rcd 1240, 41-42 (Rev. Bd. 1987), review denied, 3 FCC Rcd 4522 (1988), for the proposition that reasonable inferences are allowed.

[16] The remaining applicants -- ACB (80%), and Catalina 54 (16.6%) -- rank far behind in terms of *quantitative* integration. *See* 6 FCC Rcd 4248-49 ¶¶ 28-31 and 4255-59 ¶¶ 57-62. This clear quantitative disparity cannot be overcome by the qualitative attributes of their integrated owners. *See Miracle Strip Communications*, 4 FCC Rcd 5064, 5065-66 ¶¶ 17-20 (1989) (holding that a quantitative disparity of 12.5% is clear and cannot be overcome by qualitative considerations).

[17] Also awarded 100% integration credit, DHW and Coastal did not except to the ALJ's finding that they are *qualitatively* inferior to Es Posible (6 FCC Rcd at 4247 ¶ 21). DHW offers 100% future local residence, but no past residence-civic participation. Coastal's proposal is enhanced by 51% past and 49% current service area residence, 49% service area civic participation, and 49% broadcast experience, but its integrated owners will not move to Avalon.

[18] Es Posible offers 100% long term residence in the service area and "extensive" participation in civic activities there; Island offers 66.7% service area residence and 33.3% "slight" civic participation in the service area (4 FCC Rcd at 2364 ¶¶ 211, 213, 2355 ¶¶ 108-13).

[19] In addition to their residence-civic participation enhancements (moderate for Es Posible; slight-to-moderate for Island), both applicants received a substantial enhancement for 100% minority ownership and a slight enhancement for 100% future local residence (4 FCC Rcd at 2364 ¶¶ 211, 213). Es Posible was also credited with a moderate enhancement for 100% female ownership, and Island with a slight-to-moderate enhancement

for 66.6% female ownership (*Id.* at ¶ 215). On balance, the ALJ found that, apart from their substantial enhancements for minority ownership, Es Posible, with two moderate enhancements and one slight enhancement was the preferred applicant, and that Island followed with two slight-to-moderate enhancements and one slight enhancement (*Id.* at 2365 ¶ 216).

[20] To the extent that Island argues in opposition to the applications for review that "it is evident that [with the restored credit for broadcast experience], the Judge would have placed Island first . . . " (Opposition at n.1), Island did not challenge Es Posible's qualitative superiority in its exceptions to the Initial Decision. Section 1.277(a) of the rules provides that the applicant waives "[a]ny objection [to the Initial Decision] not saved by exception." Thus, Island is precluded from making this argument now. Nonetheless, as noted below, that argument is in any event without merit.

[21] Only Island's Rosemary Fincher -- who, with some interruption, has lived in the service area for 27 years -- even approaches the 37 years of continuous residence of Es Posible's Rosemary Garcia. (Island owners Carol Robinson and Julio Brito currently live outside the service area. Island is entitled to credit for Robinson's previous residence in the service area for 9 years; it gets only de minimis credit for Brito's previous one-year residence in the service area.) While both Garcia and Fincher are long term area residents, Es Posible deserves at least a marginal advantage on this factor. See *Beach Broadcasting Limited Partnership*, 6 FCC Rcd 4485 ¶ 2 (1991), in which the Commission awarded an applicant with 38 years residence a marginal preference for longer local residence over an applicant with 21 years. As noted above, Es Posible's advantage for longer local residence is futher enlarged by the fact that Fincher is only a one-third owner, whereas Garcia is the sole voting stockholder.

[22] Es Posible's Rosemary Garcia has been involved in an impressive variety of civic activities that span a 30-year period during which she has either held a leadership position in, or been a founder of, several organizations meeting a myriad of community needs. 4 FCC Rcd at 2351 ¶¶ 68-71. In contrast, only Island's Rosemary Fincher has more than a minimal record of civic activities in the service area that predate the filing of Island's application in December 1985. While Fincher has taken some leadership roles, most of her civic actvities predate the filing of Island's application by only one or two years, are of relatively short duration, and are confined to publicity and fundraising activities. *Id.* at 2355 ¶ 107. As Fincher's activities lack the depth, duration, and variety of Garcia's, Es Posible has an advantage over Island on this factor. *See Ronald Sorenson*, 6 FCC Rcd 1953, 1954 ¶¶ 7-11 (1991), where we awarded a substantial preference for civic participation (and a significant overall preference for residence-civic participation), based on an applicant's continuing involvement in a greater number of activities than even its closest ranked opponent.

[23] *See Kennelwood*, FCC 92-2 at ¶¶ 3-4 (applicant ahead on continuous local residence, but equal on civic activities, has an overall advantage); *Rebecca L. Boedker*, 6 FCC Rcd 2557, 2558 ¶¶ 13-15 (1991) (applicant offering longer, uninterrupted local residence and more extensive civic activities entitled to substantial enhancement credit on the combined local residence and civic participation factor); and *Ronald Sorenson*, 6 FCC Rcd at 1954 ¶ 11 (where both applicants were long-term local residents, the applicant with a substantial advantage for greater and continuing involvement in civic activities had a significant overall enhancement credit on the combined residence and civic participation factor over the applicant offering longer local residence).

[24] *Beach Broadcasting Limited Partnership*, 6 FCC Rcd 4485 ¶ 2 (1991). *See Kennelwood Broadcasting Co.*, FCC 92-2 ¶ 4 (released January 21, 1992), where applicants were equal on civic participation, the applicant offering longer continuous local residence received an advantage on the combined local residence and civic participation factor that was sufficient to overcome a competing applicant's preference for broadcast experience.

[25] Filed pursuant to section 1.65 of the rules, Es Posible's motion reports that Mateo R. Camarillo has transferred all of his shares of the Class B non-voting stock in Es Posible to Rosemary Garcia, and that Camarillo has no further ownership interest in the application. Es Posible has demonstrated that its motion is supported by good cause, and we have not received any comments respecting this motion. It is therefore granted and the attached amendment, which has no impact on the comparative issue, is accepted for reporting purposes. We note that our action in this case was delayed slightly beyond the period prescribed by *Proposals to Reform the Commission's Comparative Hearing to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 164 ¶ 50 & n.33 (Dec. 21, 1990), for Commission action on applications for review in routine cases, because the deadline for filing responsive pleadings regarding Es Posible's motion for leave to amend was January 29, 1992.

[26] As reflected in note 4 above, the Review Board's denial of the applications filed by Golden Shores Broadcasting, Inc. (File No. BPCT-860210KJ) and by Avalon Broadcasting (File No. BPCT-860210KN) is final.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

John R. Price

against

Radio Station WFBQ-FM
Indianapolis, Indiana

MEMORANDUM OPINION AND ORDER

Adopted: January 21, 1992; Released: January 28, 1992

By the Commission:

1. The Commission has before it an Application for Review filed December 9, 1991, by the above-listed complainant, seeking review of a Mass Media Bureau ruling of November 25, 1991 (DA-91-1483). That ruling denied a complaint against WFBQ-FM under Section 73.1920 of the Commission's rules ("personal attack rule") and Section 315 of the Communications Act ("equal opportunities"). WFBQ-FM filed its opposition to the Application on December 16, 1991.

2. After careful review of the instant complaint, we conclude that the Application for Review does not contain sufficient grounds to warrant a reversal or alteration of the ruling. Therefore, pursuant to Section 1.115(g) of the Commission's rules, the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

CC Docket No. 80-286

In the Matter of
Amendment of Part 36 of the
Commission's Rules and
Establishment of a Joint Board

ORDER

Adopted: February 5, 1992; Released: February 6, 1992

By the Commission:

1. On October 28, 1991, the National Association of Regulatory Utility Commissioners, pursuant to section 410(c) of the Communications Act,[1] nominated Sharon L. Nelson, Chairman, Washington Utilities and Transportation Commission, to serve on the Joint Board in CC Docket No. 80-286.[2] Commissioner Nelson would fill the vacancy on the Joint Board resulting from the departure of G. Mitchell Wilk, President of the California Public Utilities Commission.

2. Pursuant to Section 410(c) of the Communications Act, we hereby appoint Commissioner Nelson to serve on the Joint Board established in CC Docket No. 80-286. Henceforth a copy of all filings in this proceeding shall be served on Commissioner Nelson at the following address:

The Honorable Sharon L. Nelson
Chairman
Washington Utilities and Transportation
Commission
Chandler Plaza Building
1300 South Evergreen Park Drive, S.W.
Post Office Box 47250
Olympia, Washington 98504-7250
Telephone (206) 753-6423

3. ACCORDINGLY, IT IS ORDERED that the Honorable Sharon L. Nelson serve as a state member of the Joint Board in CC Docket No. 80-286.

[1] 47 U.S.C. § 410(c) (1985).
[2] Letter from Paul Rodgers, General Counsel, National Association of Regulatory Utility Commissioners, to Alfred C. Sikes, Chairman, Federal Communications Commission, dated October 28, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-373

In the Matter of

Pilgrim Telephone, Inc.

ORDER

Adopted: February 5, 1992; Released: February 6, 1992

By the Chief, Common Carrier Bureau:

1. On December 23, 1991, we issued an order in the captioned proceeding directing Pilgrim Telephone, Inc. (Pilgrim) to demonstrate that its rates are just and reasonable, or reduce its rates to a just and reasonable level, and to announce, at the beginning of each call that it handles, that its rates are available on request. [1] We issued this order pursuant to our authority to review the rates of interstate providers of operator services (OSPs) under the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA).[2]

2. On January 28, 1992, Pilgrim filed a pleading requesting that we terminate the captioned proceeding. Pilgrim argues that it is not an OSP and thus is not subject to our jurisdiction under TOCSIA. In order to have sufficient time to address the issues raised by Pilgrim's pleading, we extend the deadline by which Pilgrim must comply with our Order from February 6, 1992 to February 20, 1992. [3]

3. Accordingly, IT IS ORDERED that the effective date of the requirements that Pilgrim Telephone, Inc. demonstrate that its rates are just and reasonable and begin announcing, at the beginning of each call that it handles, that its rates are available on request IS EXTENDED until February 20, 1992.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[1] Pilgrim Telephone, Inc., CC Docket No. 91-373, DA 91-1608, released Dec. 23, 1991 (Com.Car.Bur.)

[2] TOCSIA is codified as Section 226 of the Communications Act, 47 U.S.C. § 226.

[3] We will address the merits of Pilgrim's petition at a later date.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: February 6, 1992

Ms. Beth Daly 8330-O
Media Director 92010050
Great American Media, Inc.
2626 Pennsylvania Avenue, N.W.
Suite 301
Washington, D.C. 20037

Dear Ms. Daly:

This is in response to your two recent letters requesting rulings with respect to the purchase of advertising time by political candidates. Specifically, you ask whether the FCC has any policies governing the extent to which broadcasters can require (1) advance payment, and (2) payment by cash, certified check, or wire transfer.

The Commission has no formal policy regarding advance payments for political advertisements. However, under Section 312(a)(7) of the Communications Act, 47 U.S.C. Section 312(a)(7), a broadcaster may not adopt policies that impede a federal candidate's reasonable access to its broadcast facilities. In response to previous inquiries from the public regarding advance payment, the Mass Media Bureau has advised informally that a broadcaster generally may not require political candidates, or entities buying time on their behalf, to submit payment more than one week in advance of the air date of the first advertisement in the schedule. We continue to believe that the Mass Media Bureau policy is appropriate insofar as it ensures reasonable access for federal candidates in instances where the candidate or the candidate's agency representative lacks an established credit history.

In addition, as a general matter, under Section 315(b) of the Act, 47 U.S.C. Section 315(b), a station may not discriminate against candidates vis-a-vis commercial advertisers. *See Hernstadt v. FCC*, 677 F.2d 893 (D.C. Cir. 1981) (interpreting non-discrimination prohibition of Section 315(b)). The Commission's rules also prohibit discrimination between candidates in practices or services. Thus, a station cannot discriminate between commercial advertisers and candidates, or between candidates, in the application of specific sales practices. For example, if a candidate or a candidate's agency has an established credit history (and is responsible for payment), we believe that requiring any advance payment is inappropriate if the station would not so treat commercial advertisers or their representatives under the station's customary payment/credit policies.

The Commission has not previously addressed the issue of whether a broadcaster can require a candidate to pay for advertising time by cash, certified check, or wire transfer. Thus, the establishment of payment methods is left to the discretion of broadcasters. In the absence of evidence of improper discrimination against, between or among candidates, we will not intrude in the reasonable, good faith judgment of broadcasters in this area.

Staff action is taken here under delegated authority. Application for review by the full Commission may be filed within thirty days of the date of public notice of this ruling (see Commission Rule 1.4(b) [47 C.F.R. Section 1.4(b)]) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail.

Sincerely,

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 7, 1992

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON AUDIO COMMUNICATIONS, INC. PETITION FOR DECLARATORY RULING ON 900 SERVICE GUIDELINES OF US SPRINT COMMUNICATIONS COMPANY

On June 10, 1992, Audio Communications, Inc. (ACI) filed a petition requesting that the Commission issue a declaratory ruling on whether U.S. Sprint's guidelines for 900 service violate the Communications Act. ACI argues that U.S. Sprint employs discriminatory practices in selecting the information providers to which U.S. Sprint will provide premium 900 services. ACI describes premium 900 service as a bundled package that includes billing and collection as well as transport services.

ACI states that recently U.S. Sprint, one of only three interexchange carriers providing interstate premium 900 services, notified a select group of information providers, including ACI, that these providers were no longer eligible for U.S. Sprint's premium 900 offering. ACI claims that U.S. Sprint did not base its decision to terminate premium 900 service on an information provider's ability to purchase the services or on any violations of federal and state regulations by an information provider. ACI contends that U.S. Sprint's decision was based on either the content of an information provider's service or the identity of an information provider. ACI argues that U.S. Sprint's selection criteria is unlawfully discriminatory and not in the public interest.

In addition, ACI argues that the detariffing of billing and collection does not relieve U.S. Sprint of its obligation to provide premium 900 service on a nondiscriminatory basis. ACI also suggests that the Commission reevaluate its 1986 order detariffing billing and collection in light of the development of 900 services.

Interested parties should file comments on the petition by **March 25, 1992,** and reply comments by **April 15, 1992,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Copies of the petition can be obtained from Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-124

In the Matter of

Virgin Islands Telephone
Corporation

Tariff F.C.C. No. 1 Transmittal No. 6

Switched and Special Access
Rate Adjustments

ORDER

Adopted: February 5, 1992; Released: February 5, 1992

By the Chief, Common Carrier Bureau:

1. On January 3, 1992, the Virgin Islands Telephone Corporation (Vitelco) filed a motion to stay the reporting and refund requirements imposed by the Commission after an investigation of Vitelco's rates.[1] Vitelco sought a stay pending reconsideration of the refund and/or judicial review. On January 15, the Common Carrier Bureau issued an Order extending the reporting deadline to February 14, 1992.[2] In this Order, we stay the refund and reporting requirements an additional six weeks in order to provide further time to consider Vitelco's stay request and other related pleadings. [3] In so doing, we are relying on the equitable discretion given the Commission under Section 705 of the Administrative Procedure Act, 5 U.S.C. § 705, and Section 4(i) of the Communications Act, 47 U.S.C. § 154(i).

2. Accordingly, IT IS ORDERED pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 4(i), that the Virgin Islands Telephone Company IS GRANTED an extension of time until March 27, 1992, to file a refund report with the Commission and to effectuate the refunds ordered in the above-captioned docket.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[1] *See* Virgin Islands Telephone Corporation, CC Docket No. 90-124, FCC 91-351, rel. Dec. 16, 1991 (*December 16 Order*).

[2] Virgin Islands Telephone Corporation, CC Docket No. 90-124, Order, DA 92-56, released January 15, 1992.

[3] On January 10, AT&T filed an opposition to Vitelco's motion for stay. On January 16, Vitelco filed a motion to accept its late-filed reconsideration petition. AT&T filed its opposition to Vitelco's motion on January 23; Vitelco filed its reply on January 31, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-369

In the Matter of

Fiberline Network
Communications

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

ORDER
(Proceeding Terminated)

Adopted: February 5, 1992; Released: February 5, 1992

By the Chief, Common Carrier Bureau:

1. On December 23, 1991, we released orders directing certain operator service providers (OSPs) to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On January 30, 1992, Fiberline Network Communications (FNC) filed revisions to its informational tariff which reduce its rates substantially. In an accompanying report of sample prices, FNC states that its total charge for a sample eight-minute call would be $6.57. In a report filed September 23, 1991, FNC stated that its total charge for the same call under the rates then in effect would be $9.81. This represents a reduction of 33 percent from the highest total charge FNC reported in its September 23 report. It was on the basis of that report and the rates FNC then had in effect that we found that FNC's rates appeared to be unjust and unreasonable. FNC no longer charges the rates that prompted this proceeding. FNC therefore need not provide further justification for its rates and charges at this time and is not required to announce, at the beginning of each call that it handles, that its rates are available on request.[2] We hereby terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-369 IS TERMINATED.

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[1] *See, e.g.*, Fiberline Network Communications, CC Docket No. 91-369, DA 91-1604, released Dec. 23, 1991 (Com.Car.Bur.).

[2] We emphasize that this Order does not represent an affirmative finding that FNC's rates are just and reasonable.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-367

In the Matter of

Ascom Autelca Communications

ORDER
(Proceeding Terminated)

Adopted: February 5, 1992; Released: February 5, 1992

By the Chief, Common Carrier Bureau:

1. On December 23, 1991, we released orders directing certain operator service providers (OSPs) to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On February 5, 1992, Ascom Autelca Communications (Ascom) filed revisions to its informational tariff which reduce its rates substantially. In an accompanying report of sample prices, Ascom states that its total charge for a sample eight-minute call would be $6.56. In a report filed September 23, 1991, Ascom stated that its total charge for the same call under the rates then in effect would be $10.30. This represents a reduction of more than 36 percent from the highest total charge Ascom reported in its September 23 report. It was on the basis of that report and the rates Ascom then had in effect that we found that Ascom's rates appeared to be unjust and unreasonable. Ascom no longer charges the rates that prompted this proceeding. Ascom therefore need not provide further justification for its rates and charges at this time and is not required to announce, at the beginning of each call that it handles, that its rates are available on request.[2] We hereby terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-367 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[1] *See e.g.*, Ascom Autelca Communications, CC Docket No. 91-367, DA 91-1602, released Dec. 23, 1991 (Com.Car.Bur.).

[2] We emphasize that this Order does not represent an affirmative finding that Ascom's rates are just and reasonable.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-375

In the Matter of

Telephone Operator Systems, Inc.

ORDER
(Proceeding Terminated)

Adopted: February 5, 1992; Released: February 5, 1992

By the Chief, Common Carrier Bureau:

1. On December 23, 1991, we released orders directing certain operator service providers (OSPs) to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On January 16, 1992, Telephone Operator Systems, Inc. (TOS) filed revisions to its informational tariff which reduce its rates substantially. In an accompanying report of sample prices, TOS states that its total charge for a sample eight-minute call would be $6.55. In a report filed September 23, 1991, TOS stated that its total charge for the same call under the rates then in effect would be $7.80. This represents a reduction of 16 percent from the highest total charge TOS reported in its September 23 report. It was on the basis of that report and the rates TOS then had in effect that we found that TOS's rates appeared to be unjust and unreasonable. TOS no longer charges the rates that prompted this proceeding. TOS therefore need not provide further justification for its rates and charges at this time and is not required to announce, at the beginning of each call that it handles, that its rates are available on request.[2] We hereby terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-375 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[1] *See, e.g.*, Telephone Operator Systems, Inc., CC Docket No. 91-375, DA 91-1610, released Dec. 23, 1991 (Com.Car.Bur.).

[2] We emphasize that this Order does not represent an affirmative finding that TOS's rates are just and reasonable.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-371

In the Matter of

One Call Communications, Inc.

ORDER
(Proceeding Terminated)

Adopted: February 5, 1992; Released: February 5, 1992

By the Chief, Common Carrier Bureau:

1. On December 23, 1991, we released orders directing certain operator service providers (OSPs) to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On February 5, 1992, One Call Communications, Inc. (One Call) filed revisions to its informational tariff which reduce its rates substantially. In an accompanying report of sample prices, One Call states that its total charge for a sample eight-minute call would be $6.58. In a report filed September 23, 1991, One Call stated that its total charge for the same call under the rates then in effect would be $7.87. This represents a reduction of more than 16 percent from the highest total charge One Call reported in its September 23 report. It was on the basis of that report and the rates One Call then had in effect that we found that One Call's rates appeared to be unjust and unreasonable. One Call no longer charges the rates that prompted this proceeding. One Call therefore need not provide further justification for its rates and charges at this time and is not required to announce, at the beginning of each call that it handles, that its rates are available on request.[2] We hereby terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-371 IS TERMINATED.

4. IT IS FURTHER ORDERED that the motion for stay filed by One Call Communications, Inc., IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[1] *See, e.g.*, One Call Communications, Inc., CC Docket No. 91-371, DA 91-1606, released Dec. 23, 1991 (Com.Car.Bur.). On January 22, 1992, One Call filed a motion for stay of our Order. In view of our decision to terminate this proceeding, we dismiss One Call's motion for stay as moot.

[2] We emphasize that this Order does not represent an affirmative finding that One Call's rates are just and reasonable.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-120

In the Matter of

Amendment of Section 73.202(b),	RM-6701
Table of Allotments,	RM-6999
FM Broadcast Stations.	RM-7000
(Northwye, Cuba, Waynesville,	RM-7001
Lake Ozark, and Eldon, Missouri)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 7, 1992; Released: February 20, 1992

By the Chief, Allocations Branch:

1. The Commission considers herein a *Notice of Proposed Rule Making and Order to Show Cause* ("*Notice*") in this proceeding, 4 FCC Rcd 4900 (1989), in response to a petition (RM-6701) filed on behalf of CTC Communications, Inc., ("CTC") to allot Channel 271A (102.1 MHz) to Northwye, Missouri as its first local FM service. Counterproposals were submitted by Lake Broadcasting, Inc. ("Lake"), licensee of Station KBMX(FM), Channel 270A (101.9 MHz), Eldon, Missouri; Pulaski County Broadcasters, Inc. ("Pulaski"), licensee of Station KJPW-FM, Channel 272A (102.3 MHz), Waynesville, Missouri; and by Herrin Broadcasting, Inc. ("Herrin").[2] CTC also filed comments. CTC and Lake each submitted two sets of replies.[3] Herrin, Pulaski, and Prime Time Radio ("Prime Time"), permittee of Station KSLQ-FM, Channel 283A (104.5 MHz), Washington, Missouri, also filed comments on the various counterproposals made during that comment period.

BACKGROUND

2. The *Notice*, in addition to proposing that Northwye be allotted Channel 271A to provide that community's first local FM service, also proposed the channel substitutions requested by CTC to accommodate that allotment. In this regard, the *Notice* ordered Pulaski, whose Waynesville Station KJPW-FM operates on Channel 272A, to show cause why its license should not be modified to specify operation on Channel 274A (102.7 MHz). CTC had also requested that Channel 297A (107.3 MHz) be substituted for Channel 271A at Cuba, Missouri, for which Lake was the sole applicant (and whose application for Channel 271A has since been granted[4]).

COMMENTS AND COUNTERPROPOSALS

CTC (Northwye)

3. CTC submits comments expressing its willingness to reimburse Lake for the cost of modifying its application in Cuba if still pending, and if already granted, to reimburse Lake for its costs of modifying its construction permit. CTC also states that it intends to apply for a construction permit on Channel 271A at Nothwye, and if that permit is granted, to promptly construct a facility operating on Channel 271A.

Lake Broadcasting (Eldon)

4. Lake's comments include objections to CTC's proposal that Northwye be allotted a channel to provide its first local service, and also a counterproposal to upgrade its own Station KBMX(FM) at Eldon. In objection, it maintains that Northwye does not qualify as a community for allotment purposes. Lake notes that Northwye is neither incorporated nor listed in the U.S. Census, contending that the most recent estimate of its 1989 population is 135. Indeed, Lake further notes, Northwye has been disincorporated (by Lake's reported vote of 27 of its 31 registered voters) and lacks its own zip code. Furthermore, Lake notes that CTC has not supplied "any socio-economic data" to demonstrate Northwye's community status. Lake urges alternatively that, should the Commission decide that Northwye does qualify as a community, either Channel 292A or 283A be allotted. Lake contends that either allotment to Northwye would thwart the intentions of CTC, its competitor in the Eldon market, from using a Channel 271A allotment in Northwye to block Lake from any upgrade of its Eldon Station KBMX(FM) on Channel 270C1.

5. Lake's counterproposal submitted as part of its comments requests the upgrade of Channel 270A at Eldon to Channel 270C1 and the modification of the license for its Eldon Station KBMX(FM) to specify operation on Channel 270C1. Lake contends that its proposed upgrade of its Eldon station on Channel 270C1 would neither conflict with a Northwye allotment, if implemented on Channel 292A or on Channel 283A. If Channel 271A were considered for Northwye, insists Lake, there is greater need for the Eldon upgrade because the upgraded station's population coverage within its 1.0 mV/m contour would be increased by over eight times. Moreover, Lake points out

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[1] The communities of Eldon and Lake Ozark, MO have been added to the caption.

[2] The counterproposals of Lake, Herrin, and Pulaski were all given *Public Notice* in Report No. 1796, dated September 20, 1989.

[3] The 2d set of CTC's replies, submitted three weeks after the first, concerns only Pulaski's counterproposal because CTC says it did not receive a copy of Pulaski's counterproposal. A Petition for Acceptance of Reply accompanies CTC's 2d reply. This 2d reply is accepted because it was filed before the 15-day comment period following *Public Notice* of Pulaski's counterproposal had expired or even commenced. The petition to accept the 2d reply is therefore moot, and, accordingly, CTC's 2d reply will be given full consideration in this proceeding. Lake filed its 1st set of replies before the counterproposals were placed on *Public Notice* and the 2d set following the release of the *Public Notice*, but before expiration of the fifteen-day comment period for counterproposals following such release. This is also acceptable.

[4] File No. BPH-881230MC.

that Eldon is a growing incorporated community with its own post office and zip code, with a population of over 4000 persons. Lake argues that, at minimum, the Eldon upgrade and a first local service at Northwye can be accommodated under Lake's counterproposal. With respect to CTC's proposal that Channel 274A be substituted for Channel 272A at Waynesville Station KJPW-FM, Lake supports this proposal but also proposes the alternative of upgrading KJPW-FM's facilities on Channel 274C3. Lake also recommends no change in CTC's proposal to substitute Channel 297A for Channel 271A at Cuba. Lake promises to file promptly the appropriate modification applications for the Channel 270C1 upgrade at Eldon and for the Channel 297A substitution at Cuba, if the allotments are granted.

Pulaski County Broadcasters (Waynesville)

6. Pulaski files comments that include a counteproposal to upgrade its Station KJPW-FM at Waynesville from Channel 272A to Channel 274C3 and to allot either Channel 292A or Channel 283A to Northwye. Pulaski does not oppose CTC's proposed substitution of Channel 274A for current Channel 272A at Station KJPW-FM at Waynesville, noting that its counterproposal would permit Pulaski to upgrade its Station KJPW-FM on Channel 274C3. This is identical to Lake's alternate proposal. A claimed attribute of its proposal is that the proposed upgrade at Waynesville comports with Commission policy that encourages upgrading of existing facilities on the same or adjacent channels. Pulaski claims as a second attribute the prospect that CTC's proposed substitution of Channel 297A for Channel 271A at Cuba would no longer be required if either Channel 292A or Channel 283A were allotted to Northwye.

Herrin Broadcasting (Lake Ozark)

7. Herrin's counterproposal requests that Channel 274A be allotted to Lake Ozark, Missouri as its first local service. Herrin states that Channel 274A is the only channel available for allotment to Lake Ozark. Since its proposal conflicts with CTC's recommended substitution of Channel 274A at Waynesville in order to accommodate the Northwye allotment, Herrin advises the Commission to compare the relative merits of Northwye and Lake Ozark to receive a first local service. In that neither Northwye nor Lake Ozark would receive preferences over the other on the basis of the first three comparative criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), Herrin asserts that under the fourth comparative criterion, "public interest factors," Lake Ozark should prevail. Herrin reports that, according to the "updated 1989 Census," Lake Ozark has a population of 648, which represents a "40% growth rate over the 1980 Census. " Herrin also claims that 2.5 million tourists visited Lake Ozark in 1985 and that it receives six FM signals. In comparing Northwye with Lake Ozark, Herrin cites *James Reeder v. FCC*, 865 F.2d 1298 (D.C. Cir. 1989), for the proposition that CTC must demonstrate that "Northwye is more than a 'quiet village'" by providing additional data to "justify using scarce spectrum for such a small number of persons. " Herrin believes that in addition to Lake Ozark's larger population, its "significant growth, future planned development and considerable tourist population" should result in Lake Ozark being allotted Channel 274A.

REPLIES

CTC

8. In reply, CTC advises that the Commission need not make the choice of the allotment of Channel 274A to Lake Ozark or of Channel 274C3 to Waynesville, whose allotment would accommodate the allotment of Channel 271A to Northwye. CTC cites the existence of at least two other channels that could be allotted to Lake Ozark, Channel 221A (92.1 MHz) or Channel 255A (98.9 MHz). Regarding its Northwye proposal, CTC claims that despite its being unaware at the time it filed its proposal that Northwye had been disincorporated, incorporation is not necessary for a community to receive local service. CTC cites the "substantial population of 33,731 resid[ing] within the primary service contour" of a prospective Northwye station and the possibility that the 1990 census may list Northwye as a Census Designated Place. Thus, CTC asks the Commission to withhold action until the results of the 1990 census are available.

9. CTC also regards Lake's proposal to allot either Channel 292A or Channel 283A to Northwye as "substandard" because either channel would require a ten-kilometer site restriction resulting in reduced signal strength to the most heavily populated portion of the Northwye. Furthermore, urges CTC, neither alternative channel proposed by Lake is equivalent to CTC's originally proposed channel because neither alternative channel would meet the "more stringent 6 kilowatt spacings." CTC makes a similar argument in rejecting Pulaski's counterproposal for use of the same alternative channels. CTC also similarly asserts that a ten-kilometer site restriction required to use those channels is at the outer limits of acceptability, and that such a site restriction would render the allotment virtually worthless. The area surrounding Northwye is sparsely populated, and could render a station using Channel 292A or Channel 283A commercially unfeasible, contends CTC.

Lake

10. In Lake's reply to the counterproposals, it supports its own counterproposal (which was also counterproposed by Pulaski) to allot either Channel 292A or 283A to Northwye (if the Commission deems Northwye licensable). Lake, however, strongly opposes CTC's proposal to allot Channel 271A to Northwye and Herrin's counterproposal, which includes the allotment of Channel 274A to Lake Ozark. Lake objects to that allotment because under the Commission's "quiet village" doctrine Lake Ozark may not be licensable, citing *Reeder v. FCC*, 865 F.2d 1298 (D.C. Cir. 1989), and *New South Broadcasting Corp. v. FCC*, 879 F.2d 867 (D.C. Cir. 1989). In any event, Lake considers its counterproposal superior because it would permit facility upgrades at Waynesville (by Pulaski) and at Eldon (by Lake) and first local services at Northwye (by CTC) and Lake Ozark (by Herrin). Lake contends that CTC's proposal would preclude a first local service at Lake Ozark while Herrin's counterproposal would preclude a first service at Northwye and upgrades at Eldon and Waynesville. As an alternative, Lake suggests, in the event that we decide to allot Channel 274A to Lake Ozark, that either Channel 221A or Channel 255A be allotted to Waynesville (in lieu of either Channel 274C3, which Pulaski and Lake separately propose, or Channel 274A proposed by CTC).

11. Commenting on CTC's reply, Lake notes the absence of evidence to demonstrate the qualification of Northwye as a community. Lake also contends that its proposal is not substandard in any way and meets all engineering requirements including providing principal city coverage and having proper interstation spacings for three and six kilowatts. In contesting Herrin's charge that only Channel 274A is available for allotment to Lake Ozark, Lake purports to show that Channel 250A (97.9 MHz) with a 13.3 kilometer site restriction can be allotted. Also, Lake shows that Channel 265A (100.9 MHz) can be allotted to Lake Ozark, "once favorable action is taken on RM 6658 in MM Docket No. 89-96, "which Lake considers "a reasonable certainty because no adverse comments were filed." As to Pulaski's counterproposal, Lake gives its full support to the substitution of Channel 274C3 for Channel 272A at Waynesville, but recommends, in the event the Commission allots Channel 274A to Lake Ozark, the allotment of either Channel 221A or Channel 255A to Waynesville. Lake contends that such allotment would permit Lake to upgrade its Station KBMX(FM) at Eldon.

Pulaski

12. In reply, Pulaski rebuts CTC's argument that the site restrictions required for either of the alternative Channels 283A and 292A for Northwye are so drastic that coverage of a sparsely populated area would result. Pulaski claims that this area is "essentially the same as the population" that would receive service using CTC's proposed Channel 271A. With respect to Lake Ozark, Pulaski maintains that despite the prospect of a first local service in Lake Ozark and its being a vacation area that attracts a large number of tourists, it is a very small community of 427 persons, with a need for service that "does not outweigh the need of Waynesville for improved facilities." Pulaski also points out that Lake Ozark receives service from aural facilities in surrounding communities, including those in Osage Beach, which "is virtually contiguous with Lake Ozark," and in Eldon, which "is located some 12 miles away." Nevertheless, Pulaski argues that it is not necessary to choose between Lake Ozark and Waynesville because either Channel 250A or Channel 265A is available for Lake Ozark, and each is compatible with Channel 274C3 in Waynesville.

Others

13. Prime Time Radio files comments objecting to the counterproposal to substitute Channel 283A at Northwye. Prime Time asserts that the prospective use of Channel 283A at Northwye would not permit Prime Time to upgrade its station on Channel 283A at Washington, Missouri from three to six kilowatts. On the other hand, Prime Time supports the use of Channel 292A at Northwye because it allegedly would allow Prime Time to operate its station at six kilowatts and thereby permit a more efficient use of the spectrum.

14. Herrin submitted a late-filed response to the replies of Pulaski accompanied by a motion to accept the response. In that motion, Herrin argues that because the Commission cannot likely avoid having to deal with the two alternate Channels 250A and 265A, Herrin's showing that they are defective will aid the Commission in making an allotment decision for Lake Ozark. Herrin further argues that it would be unfair to permit Pulaski to "offer decisionally relevant information" and not to permit Herrin to submit a response. We agree with Herrin and will accept its pleading because it will aid in the resolution of this proceeding.

15. In the response itself, Herrin argues that no principal community coverage is provided using Channel 250A.[5] Because Channel 265A was short-spaced to another channel at the time Pulaski filed its counterproposal, Herrin also contends, that proposal should not be accepted. It also argues that because the proposal to allot Channel 265A is contingent, speculative, and failed to adhere to strict procedural deadlines, it cannot be accepted, citing *Oxford and New Albany, Mississippi*, 3 FCC Rcd 615 (1988) at fn. 3, *recon denied*, 3 FCC Rcd 6626 (1988). Herrin further cites case law[6] supporting its statement that in allotment cases the "Commission cannot depend on the happenstance of events occurring after the deadline for filing to cure retroactively proposals that are deficient on their face *ab initio*."

DISCUSSION

16. After careful review of the CTC allotment proposal for Northwye and the counterproposals filed in response to it, we conclude that Northwye does not qualify as a community for allotment purposes. No indicia of its status as a community appear to exist nor have any been presented. We also believe that only the community of Lake Ozark, which was the subject of a counterproposal for a first local service, should be accommodated for a new allotment. The proposed Eldon and Waynesville upgrades, each mutually exclusive with the Lake Ozark proposal, will be denied. The basis for our decision is given below.

17. The Commission's policy dictates that where a community is neither incorporated nor listed in the Census, a proponent for an allotment to that community must demonstrate that it has a geographically identifiable population grouping.[7] The proponent need not show that the borders of the locality are precisely ascertainable. Instead, there must be shown that the residents of the locality are commonly regarded as a distinct group. Among the factors that can be shown are objective indications of a common perception that a locality's residents constitute a

[5] Herrin's engineering statement purports to demonstrate that Pulaski's engineering showing is incorrect. Pulaski provides a map of Lake Ozark depicting the 70 dBu contour extending "more than nine miles from the reference site," claiming to provide 100% coverage of Lake Ozark. Herrin shows instead, that from the restricted site 13.3 km (8.3 mi) from the reference coordinates, a station operating on Channel 250A (at 3 kW power and 100 m. HAAT) would place a 70 dBu contour only 8.4 mi (13.5 km) from the site, insufficient to provide complete coverage of Lake Ozark.

[6] *Santa Isabel, Puerto Rico*, 51 FR 6119 (February 20, 1986); *recon denied*, 2 FCC 3454 (1987); *rev denied*, 3 FCC Rcd at 2336 (1988), *recon denied*, 66 RR 2d 804 (1989).

[7] *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 101 (1982).

distinct "geographical population grouping."[8] These factors are many and varied and include such things as the existence of political, commercial, social and religious organizations. In short, community status can also be demonstrated by indications that "the residents function as and conceive of themselves as residents of a community around which their interests coalesce."[9]

18. While neither incorporation nor listing in the Census is a prerequisite for recognition of Northwye as a community for allotment purposes, its disincorporation along with its non-listing in the Census raises a serious question as to whether Northwye has a geographically identifiable population grouping. In reply to questions by the counterproponents as to Northwye's community status, CTC offers only that the primary service contour of a station operated on a Northwye allotment would envelop almost 34,000 persons, and that there exists the possibility that the 1990 Census might list Northwye as a Census Designated Place. Missing, of course, are any indications that the 135 residents of Northwye conceive of themselves as a community or that there are any other indications that Northwye is in any way a distinct geographical population grouping functioning like a community. We, therefore, decline to consider Northwye as a community for allotment purposes, and will dismiss CTC's petition for rule making.[10]

19. Even if we assumed that Northwye were a community for allotment purposes, it would still lose on a comparative basis with Lake Ozark, under the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).[11] Since the proposals for Lake Ozark and for Northwye would not provide either a first or second full-time aural service, and they both would provide a first local service, the fourth allotment priority would apply--public interest factors. Since both communities have at least 6 reception services, the comparison should be made based on the population of the communities. *See Seymour and Pigeon Forge, Tennessee*, 2 FCC Rcd 2016 (1987). Since Lake Ozark has a population of 648 persons and Northwye has only 135 persons, Lake Ozark would be favored over Northwye for a first local service.

20. With dismissal of the Northwye proposal, we can now consider the proposals for Eldon, Waynesville, and Lake Ozark. As noted by Lake, an allotment to Lake Ozark on Channel 274A[12] would preclude both the upgrade proposals for Eldon and Waynesville. On the other hand, the proposed upgrades of the Eldon and Waynesville stations are compatible with each other. Because our analysis shows that indeed only Channel 274A is available for Lake Ozark,[13] we must choose between allotting a first local service to that small community and providing for the upgrade of existing services in two larger neighboring communities. Since the allotment of a first local service at Lake Ozark triggers priority 3 and the two upgrades at Eldon and Waynesville constitute enhanced secondary service under priority 4 -- other public interest factors -- the Lake Ozark proposal is favored over the upgrades under the allotment priorities.

21. We also note that the Eldon and Waynesville counterproponents contend that Lake Ozark is a quiet village[14] and therefore not entitled to a first local service preference under priority 3. We disagree. As explained in *Scranton and Surfside Beach, South Carolina*, 3 FCC Rcd 2798 (1988), the quiet village model pertains to the limited fact situation of mutually exclusive requests for a first local service in one community and a first competitive service in another community, and has not been extended to situations like the instant proceeding involving a comparison of a first local service and an upgrade for an existing station. The counterproponents have not cited any cases in which the quiet village doctrine has been successfully applied in such circumstances and have not given us any reasons for extending the doctrine to such a fact pattern. Moreover, even assuming that Lake Ozark were a quiet village and were not entitled to a first local service preference, the Lake Ozark proposal would still be favored comparatively under priority 4 -- other public interest factors -- over the upgrade requests at Eldon and Waynesville, because it is well established that a new

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[8] *See Beacon Broadcasting*, 2 FCC Rcd 3469 (1987), *recon denied*, 2 FCC Rcd 7562 (1987). *See also Semora, North Carolina*, 5 FCC Rcd 934 (1990).

[9] *See Mighty-Mac Broadcasting Co.*, 58 RR 2d 599, 603 (1985); *North Naples, Florida*, 41 RR 2d 1549, 1551 (1977).

[10] Lake's suggests that the Commission investigate the character qualifications of CTC because it proposes that a "virtually non-existent and non-licensable" community be allotted a channel, and that the proposal has a "clearly anti-competitive impact on the future operations of another station (KBMX)." We regard this suggestion as moot in view of our dismissal of CTC's proposal. In any event, the mere filing of CTC's proposal is not indicative of bad faith in the absence of extrinsic evidence, and our rules proscribing abuse in allotment proceedings were not in effect at that time. *See Marine Broadcasting*, FCC 92-4, released January 15, 1992, at note 9.

[11] The allotment criteria are the following, listed according to priority:

(1) first full-time aural service;

(2) second full-time aural service;

(3) first local service; and

(4) other public interest matters.

[Co-equal weight given to priorities (2) and (3)]

[12] Allotment of Channel 274A to Lake Ozark assumes use of a site restriction to avoid a short-spacing to Station KMMO(FM), Marshall, MO, Channel 275C1.

[13] All other channels proposed or recommended by the various parties do not comply with our minimum distance separation requirements. This includes the allotment to Lake Ozark of Channel 250A, suggested by Pulaski in its reply as a usable channel assuming a site restriction of 13.3 km. After an independent and thorough analysis of 7.5 minute USGS maps of the area surrounding Lake Ozark, we find that from such a restricted site 70 dBu coverage could not be provided over Lake Ozark to an even greater extent than Herrin alleged in its response. Likewise, the allotment of Channel 265A to Lake Ozark would conflict with allotment proposals for Doolittle, MO in MM Docket 90-173 and Osage Beach, MO in MM Docket 90-66 on Channel 264A and Channel 265A, respectively.

[14] While a quiet village is a community for allotment purposes, it is not necessarily entitled to a Section 307(b) preference as a first local service because its lack of need for coverage of local issues may not outweigh the need for a competitive service elsewhere.

primary service serves a superior public interest need to that of an enhanced or upgraded secondary service. *See Atmore, Mississippi, et al.*, DA 89-1198, released October 3, 1989; *Benton, Arkansas*, 2 FCC Rcd 1963 (1987) and 3 FCC Rcd 4840 (1980); and *Corinth and Queensbury, New York*, 5 FCC Rcd 3243 (1990).

22. We conclude, therefore, that the public interest would be served by allotting Channel 274A to Lake Ozark as that community's first local transmission service. The coordinates for Channel 274A at Lake Ozark are N 38-05-34 and W 92-34-18, assuming use of a restricted site (from which a 70 dBu signal encompasses the entire community) 13.1 kilometers south of that community's reference point.[15]

23. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 6, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

Community	Channel No.
Lake Ozark, Missouri	274A

24. The window period for filing applications for Channel 274A at Lake Ozark, Missouri will open on **April 7, 1992** and close on **May 7, 1992.**

25. IT IS FURTHER ORDERED, That the Motion to Accept Response filed by Herrin Broadcasting, Inc. is GRANTED.

26. IT IS FURTHER ORDERED, That the Petition for Rulemaking and for Issuance of Orders to Show Cause (RM-6701) filed by CTC Communications, Inc. is DISMISSED.

27. IT IS FURTHER ORDERED, That the counterproposal (RM-7001) filed by Lake Broadcasting, Inc. is DENIED.

28. IT IS FURTHER ORDERED, That the counterproposal (RM-6999) filed by Pulaski County Broadcasters, Inc. is DENIED.

29. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

30. For further information concerning this proceeding, contact J. Bertron Withers, Jr., Mass Media Bureau, (202) 634-6350.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[15] Because the petition that resulted in the allotment of Channel 274A to Lake Ozark was filed prior to October 2, 1989, the applicants for this allotment may avail themselves of the provisions of Section 73.213(c)(1) with respect to Station KMMO(FM), Channel 275C1 (102.9 MHz), Marshall, MO.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-544

In re Applications of

HUGHES-MOORE ASSOCIATES, INC.	File No. BPH-870612MC
HERBERT REGENSTREIF	File No. BPH-870615MI
MIDWAY COMMUNICATIONS, LTD.	File No. BPH-870615MT
BELHOUSE & ASSOCIATES, INC.	File No. BPH-870615MV

For Construction Permit for New FM Station, Midway, Kentucky

MEMORANDUM OPINION AND ORDER

Adopted: February 10, 1992; Released: February 19, 1992

By the Commission:

1. Before the Commission are an Application for Review filed May 9, 1991, by Herbert Regenstreif (Regenstreif), a Request for Official Notice filed June 13, 1991, by Belhouse & Associates, Inc. (Belhouse), and an Opposition to Application for Review filed June 17, 1991, by Midway Communications, Ltd. (Midway). These pleadings relate to a Review Board decision, *Hughes-Moore Associates, Inc.*, 6 FCC Rcd 889 (Rev. Bd. 1991), *recon. denied*, 6 FCC Rcd 1984 (1991), denying Regenstreif's appeal of the Administrative Law Judge's order (FCC 90M-2868, released September 12, 1990), allowing Midway to participate in the applicants' universal settlement agreement terminating this proceeding. We will grant Regenstreif's application for review, vacate the Board's decision reinstating Midway's application, the ALJ's order allowing Midway to participate in the agreement, and the Board's decisions here appealed, and reinstate the ALJ's order dismissing Midway's application.

BACKGROUND

2. By *Memorandum Opinion and Order*, FCC 90M-103, released January 18, 1990, the Administrative Law Judge (ALJ) dismissed Midway's application for its failure to file a notice of appearance as required by 47 C.F.R. § 1.221 and denied it the right to payment under a settlement agreement entered into by the applicants; approved the remainder of applicants' agreement; granted the construction permit here requested to Regenstreif and Belhouse, who had merged their interests pursuant to that agreement; and terminated this proceeding.[1]

3. The Review Board thereafter reinstated Midway's application relying on *St. Croix Wireless Co.*, 3 FCC Rcd 4073 (1988), noting that the Commission held there that an applicant could file a late notice of appearance and participate in an earlier filed settlement agreement, if the agreement involved all of the applicants, would terminate the proceeding, and would not prejudice the other parties or the public. (Midway had filed a late notice of appearance.) Since the applicants' settlement agreement was not before it, the Board remanded the matter to the ALJ for action consistent with *St. Croix*. *See Hughes-Moore Associates, Inc.*, 5 FCC Rcd 3694 (1990) (hereafter remand order).

4. The ALJ on remand applied *St. Croix* and allowed Midway to join in the agreement. *Order*, FCC 90M-2869, released September 12, 1990. Regenstreif appealed that order, as well as the Board's remand order upon which it was predicated. He contended that Midway had not in fact filed with the Commission a timely appeal of the ALJ's earlier order dismissing its application, since no record of such a filing could be found in the Commission's files, nor had any of the parties ever received a copy of that purported appeal.[2] Midway's failure to file an appeal, Regenstreif argued, resulted in the ALJ's dismissal order becoming final as a matter of law under 47 C.F.R. § 1.302, and, thus, actions thereafter by the Board (its remand Order) and the ALJ (allowing Midway to participate in the settlement) were void *ab initio*.

5. Recognizing that a significant question had been raised as to whether Midway had filed with the Commission its questioned appeal, the Board, by letter dated November 14, 1990, directed Midway to file a statement for the record explaining the circumstances surrounding the filing of that appeal. The Board emphasized that it was interested in obtaining information as to how the appeal was filed (*i.e.*, by mail, courier, or by the applicant or counsel), and how Midway came to retain possession of a pleading that had been originally stamped by the Commission.

6. Midway responded to that directive with a verified statement from its counsel, Statement For The Record, filed November 29, 1990. Therein, counsel stated that Midway's appeal was filed with the Commission by overnight courier; that he did not know which courier was utilized but was attempting to obtain invoices and bills of lading to establish the identity of the courier; and that neither he nor Midway had the appeal stamped original by the FCC. Counsel also submitted another copy of Midway's appeal, pointing out that the FCC Mail Section stamp affixed thereon indicated that it was filed on February 1, 1990, rather than on February 19, 1990, as the Board had previously found in its remand order.[3] Exhibit 13 to Midway's Statement For The Record.

7. Based on the foregoing, the Board concluded that Midway had shown that it had timely appealed the ALJ's dismissal order, and, thus, it rejected Regenstreif's contention that the Board had improperly exercised its authority under Section 1.302 when it ruled on that appeal and entered its remand order. Accordingly, the Board denied Regenstreif's appeal of the ALJ's ruling allowing Midway to join in the applicants' settlement agreement, after concluding that the ALJ had correctly applied *St. Croix*, *supra*. *Hughes-Moore Associates, Inc.*, 6 FCC Rcd 889 (1991), *recon. denied*, 6 FCC Rcd 1984 (1991).

DISCUSSION

8. Regenstreif argues that Midway's statement for the record was inadequate to show that it had timely appealed the ALJ's order dismissing its application, and that the Board erred in holding otherwise. We agree. Throughout this proceeding Midway has relied on copies of its appeal with an FCC Mail Section stamp to show that it filed a timely appeal of the ALJ's dismissal order.[4] The Board twice accepted those copies as meeting Midway's burden of proof of showing actual receipt by the Commission of the purported appeal: first, when it reinstated Midway's application and entered its remand order (n.2, *supra)*; and, again, when it rendered its decision here appealed. We believe the Board erred when it found that copies of that pleading were sufficient to show that the claimed appeal was actually received by the Commission. It is well settled under established rules of evidence that a copy of a document will not suffice when the original contains certain features that are disputed and subject to disavowment. *See Wigmore, Evidence*, § 1179, page 417, explaining the reasons for the best evidence rule: "As between a supposed literal copy and the original, the copy is always liable to errors by the copyist, whether by willfulness or by inadvertance * * * [and] the original may contain, and the copy will lack, such features of handwriting, paper and the like * * *." *See also United States v. Alexander*, 326 F.2d 736 (4th Cir. 1964) (citing the above with approval); and *United States v. Vandersee*, 279 F.2d 176, 180-181 ¶ 9 (2nd Cir. 1960) (although a copy of a typed original may be acceptable, it will not suffice if it is challenged.)

9. Here, Regenstreif challenged the authenticity of the copy of Midway's appeal submitted by counsel as an exhibit to his verified statement. (Reply to Midway's Statement for the Record filed December 10, 1990). He contended that the FCC stamp appearing thereon could be unauthentic for various reasons, and that counsel should submit the copy of Midway's appeal with the original FCC ink stamp purportedly returned to him by the Commission when he filed that appeal. The Board refused to require counsel to submit the pleading, finding that the copy with the FCC stamp appearing thereon that had been submitted by counsel was sufficient to show that Midway's claimed appeal was timely received by the Commission (6 FCC Rcd at 889-890 ¶¶ 7 and 8). As the authenticity of a specific feature of the submitted copy, the FCC stamp thereon, had been challenged, we believe the Board erred in failing to require counsel to submit the requested pleading.[5] In the absence of a document with an actual FCC date stamp, and where neither the Commission nor the parties have a record of initially receiving the pleading in question, see paras. 10-11, *infra*, the submitted copy of Midway's appeal was not entitled to be accepted at face value, and the Board erred in holding otherwise.

10. Moreover, an applicant such as Midway, whose claim to have filed a document with the Commission is disputed, has the initial burden to show that the document was properly delivered to the Commission when there is no record of such a filing in the Commission's files. If regular mail service is used, the applicant must submit proof that the mailed document was properly addressed to the Commission, had sufficient postage, and was deposited in the mail. *See In re Yoder Co.*, 758 F.2d 1114, 1118 ¶ 4 (6th Cir. 1985); and *Simpson v. Jefferson Standard Life Insurance Company*, 465 F.2d 1320 (6th Cir. 1972). That a delivery service other than regular mail service is used does not materially affect the type of proof that must be submitted. *See Yoder, supra* at 1120, 1121 ¶¶ 10 and 11.

11. Here, Midway relied on a verified statement of its counsel to meet its burden of proof of proper delivery. Therein, counsel stated that he used an overnight courier to deliver Midway's claimed appeal to the Commission, that he did not know which courier was used, but that he was attempting to obtain invoices and/or bills of lading to establish its identity. Midway has never provided these documents to the Commission, even though it was specifically invited to do so.[6] Under the circumstances of this case, we believe that something more was required of Midway: namely, the pertinent invoice and/or bill of lading from the courier that counsel indicated he was attempting to obtain, which would have certainly shown the identity of the courier and when its services were retained. In the absence of such corroborating evidence, we cannot agree with the Board that Midway met its burden of showing proper delivery to the Commission of its appeal.

12. In view of the foregoing, we find that no timely appeal of the ALJ's order dismissing Midway's application was pending before the Commission; that no good cause for the late-filing of such an appeal is apparent based on the circumstances before us; that, consequently, the ALJ's dismissal order became final as a matter of law under Section 1.302;[7] and that actions thereafter by the Board and the ALJ were therefore void *ab initio*.

13. ACCORDINGLY, IT IS ORDERED, That the Board's decision, 5 FCC Rcd 3694 (1990), reinstating Midway's application, the ALJ's order, FCC 90M-2868, released September 12, 1990, allowing Midway to participate in the applicants' settlement agreement, and the Board's decisions, 6 FCC Rcd 889 (1991), *recon. denied*, 6 FCC Rcd 1984 (1991), ARE VACATED.

14. IT IS FURTHER ORDERED, That the ALJ's order, FCC 90M-103, released January 18, 1990, dismissing Midway's application IS REINSTATED.

15. IT IS FURTHER ORDERED, That the Application for Review filed May 9, 1991, by Herbert Regenstreif IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Under the applicants' settlement agreement Midway was to receive $30,000 from Regenstreif and Belhouse for the dismissal of its application. As the agreement was filed prior to August 1, 1991, it is not subject to the current requirements of 47 C.F.R. § 73.3525 which limit settlement payments to legitimate and prudent out-of-pocket expenses. *See Amendment of Section 73.3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, 6 FCC Rcd 85 (1990), *clarified and modified on reconsideratioin*, 6 FCC Rcd 2901 (1991).

[2] The Board's remand order was issued in response to an appeal (titled Exceptions), which was submitted to the Board by Midway's counsel on April 2, 1990, 41 days after the February 20 due date and after he had been informed during an earlier status check that no such pleading was then pending before the Board. *See*, 5 FCC Rcd 3694 at n.1 and 6 FCC Rcd at 890 ¶ 9. As the submitted copy bore an FCC Mail Section stamp indicating that it was timely filed with the Commission, the Board concluded that it had authority under 47 C.F.R. § 1.302 to rule on that appeal.

[3] The Board subsequently acknowledged that fact, but found that it was harmless error since Midway's appeal was filed more timely than the Board had thought when it entered its remand order. *See* 6 FCC Rcd 890 at n.2 (1991).

[4] As previously mentioned, none of the parties to this proceeding ever received a copy of that appeal, even though the certificate of service attached thereto indicated that copies were mailed to them. Non-receipt of copies by them warrants an inference that the claimed appeal was in fact not received by the Commission. *See Baldwin v. Fidelity Phenix Fire Insurance Co. of N.Y.*, 260 F.2d 951 (6th Cir. 1958) (evidence that one addressee did not receive a notice supports the inference that another addressee did not receive the notice). Moreover, where, as here, two independent delivery services were allegedly used (an overnight courier to deliver the document to the Commission and regular mail service to deliver copies to the parties) we believe that such an inference is even stronger since the likelihood that both delivery services would fail to deliver the pleadings is extremely remote.

[5] While this matter was pending before us, counsel was accorded the opportunity to submit the actual stamped-in copy of Midway's appeal that bears the original ink stamp of the FCC Mail Section, as well as the documentation from the courier that he previously indicated he was attempting to obtain. FCC 91I-062, released September 11, 1991. Counsel for Midway submitted neither. Instead, on September 18, 1991, he merely again submitted a copy of Midway's Exceptions. Counsel further stated that "the documents regarding the courier are not in my control, but I have requested them from my former firm." Thus, Midway has provided no documents showing receipt of its pleading by the FCC and it has given no credible explanation why they are unavailable.

[6] *See* n.5.

[7] Section 1.302 provides that a presiding officer's final ruling, such as a dismissal of an application, shall be final 50 days after the day of its release, if an appeal is not filed following the filing of a notice of appeal.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
February 12, 1992

Released: February 19, 1992

Michael Steven Levinson 91120614
978 Amherst Street
Buffalo, NY 14216

Dear Mr. Levinson:

This is in response to your complaint against New Hampshire noncommercial educational stations WENH-TV, Durham, and WEKW-TV, Keene. In a separate filing, you also complained against noncommercial station WGBH-TV, Boston, Massachusetts. You complain that each of these stations denied you reasonable access under Section 312(a)(7) of the Communications Act (47 U.S.C. Section 312(a)(7)).

You assert a right to reasonable access under Section 312(a)(7) as a legally qualified candidate for the Republican nomination for the office of President of the United States on the New Hampshire primary ballot, a contention unchallenged by the licensees. In this capacity, you requested a three-hour block of prime time programming from the above-named stations in order to present your message to the electorate. Each licensee has responded to your request by offering five minutes of programming during prime time hours. You have apparently rejected each offer.

The licensees have raised two principal bases for denying your request and for making their respective offers. First, they contend that your request for three hours of prime time programming would have a significant disruptive effect upon each station's programming. Secondly, the licensees note that there are at least nineteen candidates for the Republican nomination on the New Hampshire ballot and at least 36 candidates seeking the Democratic nomination, other party nominations, and nomination as independents. The licensees contend that if you were provided with more than the offered five minutes, the potential for requests from the candidates for reasonable access and equal opportunities under Section 315(a) of the Communications Act (47 U.S.C. Section 315(a) would be unduly burdensome. Thus, the licensees believe that, under the circumstances in New Hampshire, their offers are reasonable. We are unable to find the offers of five minutes of prime time programming to be unreasonable.

DISCUSSION

Section 312(a)(7) states:

> (a) The Commission may revoke any station license or construction permit --
>
> (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

The U.S. Supreme Court., in its landmark reasonable access decision, *Carter/Mondale v. FCC*, 101 S.Ct. 2813, 2825, stated:

> In responding to access requests, however, broadcasters may also give weight to such factors as . . . the disruptive impact on regular programming, and the likelihood of requests for time by rival candidates under the equal opportunities provision of Section 315(a).

Thus, the licensees' offers of five-minute program slots appear to be properly geared to circumstances articulated by the Court such as substantial program disruption and the possibility of a significant number of equal opportunities requests. Furthermore, the Court in *Carter/Mondale* stated that if the proper factors are considered in responding to a candidate's reasonable access request, and no evidence of bad faith is shown, it is not appropriate for the Commission to second-guess a licensee's determinations in responding to reasonable access requests even when the Commission might have reached a different conclusion:

> If broadcasters take the appropriate factors into account and act reasonably and in good faith, their decisions will be entitled to deference even if the Commission's analysis would have differed in the first instance.

Id. at 2825-26.

It is important to note that all of the stations involved in this complaint are noncommercial and must provide reasonable access without charge, except for reasonable production charges. Therefore, the stations reasonably anticipate a large number of equal opportunity requests, as well as reasonable access requests. As noted by the Court in *Carter/Mondale*, these are legitimate factors for stations to consider in assessing a response to a particular reasonable access request.

Based on the foregoing, your complaints against stations WENH-TV, WGBH-TV, and WEKW-TV ARE DENIED.

Staff action is taken here pursuant to delegated authority. Application for Review by the full Commission may be requested within thirty days of the date of this letter, by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail.

Sincerely,

Milton O. Gross, Chief
Fairness/Political Programming Branch
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-344

In re Applications of

JULIA A. MOORE File No. BPH-880816MX

WILLIAM L. CARROLL File No. BPH-880816OA

MICHAEL A. McMURRAY & MARILYN A. McMURRAY, A GENERAL PARTNERSHIP, d/b/a McMURRAY COMMUNICATIONS File No. BPH-880816OI

For Construction Permit for a New FM Station on Channel 247A in Lebanon, Ohio

Appearances

Eric L. Bernthal, Everett C. Johnson, Jr., and *Robin L. Shaffert*, on behalf of Julia A. Moore; *A. Wray Fitch, III*, on behalf of William L. Carroll; *Richard F. Swift*, on behalf of Michael A. McMurray & Marilyn A. McMurray, A General Partnership, d/b/a McMurray Communications; and *James W. Shook*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: February 12, 1992; Released: February 19, 1992

PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of Michael A. McMurray and Marilyn A. McMurray, a General Partnership, d/b/a McMurray Communications, Julia A. Moore (Moore) and William L. Carroll (Carroll) for a new FM broadcast station to serve Lebanon, Ohio. These applications, as well as six other applications which have since been dismissed,[1] were designated for hearing by the Chief, Audio Services Division, in *Hearing Designation Order*, DA 90-997, adopted July 24, 1990; released August 2, 1990 (HDO). The only issue designated with respect to the remaining applicants is a standard comparative issue.

2. A prehearing conference was held on November 2, 1990. *Order*, FCC 90M-344, released August 7, 1990. Written testimony was exchanged on January 28, 1991. The hearing to cross-examine on that testimony was held on February 11 and 12, 1991. The hearing record was closed on February 12, 1991. Tr. at 291; *Order*, FCC 91M-601 (released February 14, 1991). Proposed Findings of Fact and Conclusions of Law were filed on April 9, 1991, and replies were filed on April 22, 1991.

FINDINGS OF FACT

Julia A. Moore

Structure

3. Julia A. Moore is an individual applicant filing as a sole proprietor. Moore Ex. 1 at 1.

Integration

4. If Ms. Moore is awarded the construction permit, she will work full time, at least forty hours per week, at the station as the General Manager. Moore Ex. 1 at 1. As General Manager, Ms. Moore will perform all the functions normally associated with that title. She will oversee all aspects of her station's operations, including but not limited to sales, programming, staffing, engineering, and community relations. She will also administer her station's Equal Employment Opportunity program. Moore Ex. 1 at 1.

5. Ms. Moore is currently employed as Chief Financial Officer for Progressive Technology, Inc. Moore Ex. 1 at 1. Upon grant of the construction permit to her, she will discontinue this and any other employment, to devote full time to the operation of the station. Moore Ex. 1 at 1. Ms. Moore has a ten-year employment contract with Progressive Technology. Tr. at 45. Ms. Moore may unilaterally terminate that contract at any time, Tr. at 57, and will do so upon grant of the construction permit to her. Moore Ex. 1 at 1.

6. From 1962 until 1989, Ms. Moore co-owned and operated a number of businesses in Southwestern Ohio. From 1968 until 1989, the businesses that she co-owned and operated were in Lebanon. The businesses include Progressive Technology, Inc., Progressive Structures, Inc., Progressive Computer Services, Inc., Adnet Company, Progressive Paper Products, Inc., and N-Line Manufacturing, Inc. Moore Ex. 1 at 2. Ms. Moore ran these businesses. Tr. at 39.

7. Ms. Moore has lived in Lebanon, Ohio since 1968. Since May 1990, she has lived at 210 East Silver Street, Lebanon, Ohio 45036. From 1968 until May 1990, she lived at 902 McBurney Drive, Lebanon, Ohio 45036. From 1962 through 1968, she resided in Dayton, Ohio. Moore Ex. 1 at 2. Ms. Moore's three sons and six grandchildren live in Lebanon, Ohio. Moore Ex. 1 at 2.

8. Ms. Moore is currently a member of the Board of Directors of the Lebanon Area Chamber of Commerce for the 1990-1993 term. Moore Ex. 1 at 2. Ms. Moore has been a member of the Chamber of Commerce since 1970, and has attended virtually all its meetings over the last 20 years. Ms. Moore has donated to and participated in the Chamber's annual auction. Moore Ex. 1 at 2.

9. Since 1971, Ms. Moore has been a patron of the Warren County Historical Society. In 1990, she became a member and active participant in the newly formed Historical Preservation Association, East Enders. Moore Ex. 1 at 3.

10. Ms. Moore is a charter member of Countryside YMCA, a family "Y" started in 1978 on 150 acres of land within Lebanon's city limits. Ms. Moore actively worked to obtain contributions from industry leaders. She remains an active member of the Y. Moore Ex. 1 at 3.

11. Ms. Moore has been actively involved with the Warren County Humane Association since approximately 1978. Moore Ex. 1 at 3.

12. Ms. Moore has been involved in fundraising for a number of causes since approximately 1970. She has served as neighborhood captain for cancer and leukemia drives. Moore Ex. 1 at 4. Ms. Moore has also been involved with March of Dimes fundraising and fundraising for Lebanon's Applefest. Moore Ex. 1 at 4.

13. Ms. Moore served for three years as Chairman of the Industrial Campaign of the Warren County United Appeal during the 1970s. She also served for one year on the Board and the Committee allocating charity grants. Moore Ex. 1 at 3-4.

14. Ms. Moore has been a member of the Lebanon United Methodist Church since 1968, having transferred her membership from Dayton. Moore Ex. 1 at 4. Ms. Moore has provided occasional emergency child care in the church nursery. From approximately 1982 through 1988, Ms. Moore was active in the United Methodist pre-school fundraising efforts. Moore Ex. 1 at 4.

Diversification

15. Ms. Moore has no other mass media interests. Moore Ex. 1 at 1. Ms. Moore owns 1,000 shares of publicly-traded stock of Jacor Communications, Inc. (Jacor), a group owner of radio stations. Moore's Jacor stock represents a less than one percent ownership interest in Jacor. Moore Ex. 1 at 1.

Auxiliary Power

16. Ms. Moore proposes to install auxiliary power generators at both her transmitter/tower and main studio locations to make sure that the station will remain operational in the event of a power failure. Moore Ex. 1 at 4.

William L. Carroll

Structure

17. William L. Carroll is an individual applicant filing as a sole proprietor. Carroll Ex. 1 at 1.

Integration

18. Carroll has proposed to be employed, full-time, no less than 40 hours per week on a daily basis as his proposed station's General Manager. As General Manager, he will be responsible for the overall operation and management of the station. All management personnel will report directly to him. Carroll will be responsible for hiring and firing and for establishing station policy. Carroll Ex. 1 at 1.

19. Carroll is presently the Pastor of Cathedral of Life World Outreach Center in Fairborn, Ohio, about thirty miles from Lebanon. Tr. 74. The congregation consists of approximately 20 families. Carroll devotes approximately 25 hours a week to his duties as a pastor. In the event his application for a new FM station in Lebanon is granted, he has proposed to reduce his present pastoral employment to no more than 15 hours per week commencing no later than the initiation of program tests. Carroll Ex. 1 at 1.

20. Carroll will reduce his hours as a pastor by allocating more responsibility to the assistant pastor. Carroll is also presently training approximately six individuals who will also assist in the ministry. His sole responsibility if his application is granted will be to prepare others for the ministry and to preach on Sunday. Other than his full-time, 40 hours per week, duties as General Manager of the station and his 15 hours per week duties as a pastor, Carroll will have no other employment if his application is granted. Carroll Ex. 1 at 1; Tr. 82-83.

21. Carroll is currently a resident of Centerville, Ohio, within the station's proposed 1 mV contour. He has been a resident in Centerville, Ohio within the 1 mV/m contour for the past 15 years. He does not plan to move to Lebanon, Ohio in the event his application were granted. *Id.* at 2.

22. Carroll is currently, and has been since March 23, 1989, the President and Trustee of Life World Outreach Communications, Inc., licensee of WIDS(AM), Russell Springs, Kentucky. Although the station is managed on a day-to-day basis by a general manager, Carroll is in regular contact with the station manager and oversees the operation of the station. All major management decisions (i.e., programming, hiring, and expenditures) are made or approved by Carroll. Carroll Ex. 1 at 3.

23. Carroll was also employed as part-time disc jockey at WGIC in Xenia, Ohio for about 2 years. He began this employment in 1973 or 1974 after graduating from high school. During this period and for an additional subsequent 2-year period, Carroll produced a religious program aired on WGIC and WBZI in Xenia, Ohio. He also produced a program aired on WGIC for a 2-year period beginning in approximately 1983. *Id.* at 3.

Diversification

24. Carroll has no attributable interest in any media of mass communications. He is the President and Trustee of Life World Outreach Communications, Inc. (WLOC), licensee of standard broadcast station WIDS, Russell Springs, Kentucky. He and his wife, who is also a Trustee and the Secretary/Treasurer of WLOC, will divest all and any interest in and association with WIDS prior to commencement of program tests in the event Carroll's application for Lebanon, Ohio is granted. Carroll Ex. 1 at 3.

Auxiliary Power

25. Carroll will utilize auxiliary generators at both his studio and proposed transmitter site in order to assure continued service in the event of a power outage. *Id.* at 3.

McMurray Communications

Structure

26. Michael A. McMurray and Marilyn A. McMurray, a general partnership d/b/a McMurray Communications, is a general partnership formed under the laws of the state of Ohio on August 1, 1988. The two equal general partners of the partnership, each of whom have a fifty percent interest in the partnership, are Michael A. McMurray and Marilyn A. McMurray, who are husband and wife. Tr. 184. For the purpose of the partnership business, each

general partner has equal power and authority in binding and managing the partnership. McMurray Ex. 1 at 1; Moore Ex. 3.

27. Partnership expenses are paid from a McMurray Communications account into which funds are placed by the McMurrays from their joint savings account. Tr. 128, 198, 233. Those expenditures are segregated from non-partnership related expenditures and capitalized against their partnership investment. Tr. 129-131, 137, 139-140.

28. Mr. and Mrs. McMurray's goal has always been to operate a Lebanon radio station. Tr. 124. They first met with their current communications attorney at a National Association of Broadcasters convention in 1985, having been referred to him by another broadcaster. Tr. 118, 170, 223, 278, 289.

29. Together the McMurrays formulated a detailed business plan, Tr. 166-167, 170, 195, 254-255, prepared their application, Tr. 289-290, and met with their proposed lender to obtain a bank commitment and with Warren County representatives to obtain their antenna site. Tr. 187, 291.

Integration

Mr. McMurray

30. Mr. McMurray will be the full-time General Manager of the Lebanon station[2] and will devote a minimum of forty (40) hours per week to his duties as General Manager. As General Manager, he will have overall responsibility for the management of the station, including the supervision of department heads, insuring the coordination of all departments at the station, securing the proper functioning of station operations and maintaining community relations with the city of Lebanon. Tr. 259. As a General Partner he will have responsibility for making decisions on matters affecting station policy. McMurray Ex. 2 at 1. Tr. 257 - 258.

31. Mr. McMurray has lived within the 1 mV/m signal contour of the proposed Lebanon station all of his life (45 years) except for three years when he served in the U.S. Marine Corps and three and one-half years when he attended college. Mr. McMurray was born in 1945 and raised in Middletown, Ohio which is located within the 1 mV/m signal contour of the McMurrays' proposed radio station. McMurray Ex. 2 at 1. He has lived in Lebanon, Ohio since 1972 and intends to continue to reside there. McMurray Ex. 2 at 6.

32. During his nineteen years in Lebanon, Mr. McMurray has attended and actively supported the Lebanon United Methodist Church. He was the neighborhood captain for the Church's annual pledge drive for four years between 1984 through 1987. He has taken an active role in volunteering for many of the Church's youth activities including instruction on understanding the media, rock n' roll music, and its impact on drugs and music, and acting as a chaperon for many youth activities. He has been a volunteer with the Children's Church, working with children while their parents attended services, and was a member of the Church choir for approximately five to six years. McMurray Ex. 2 at 7.

33. In 1972, Mr. and Mrs. McMurray joined a Lebanon theater group, the Lebanon Players, a group of local volunteers who perform popular plays for the community. Mr. McMurray was active in this group for about three years. For the past nineteen years he has been a member of the Dickens Carolers, a local singing group that performs throughout the Lebanon area for nursing homes, festivals and businesses on a volunteer basis. McMurray Ex. 2 at 7.

34. He has been a member of the Warren County Historical Society for the past three years and volunteered for Society functions including conducting programs on the History of Radio and Christmas at Glendower Museum in Lebanon. Since 1989 he has been a member of the Lebanon Chamber of Commerce and for the past three years, even before he became a member, have assisted with fund raising endeavors by acting as Master of Ceremonies for the annual Chamber Auction which is the Chamber's largest annual fund raiser. He also volunteered time for The Great Ohio Bicycle Adventure by working a festival booth with his wife. McMurray Ex. 3 at 7-8.

35. In 1990 Mr. McMurray was the Master of Ceremonies for the Middletown Chamber of Commerce's annual golf tournament and dinner and in 1991 he was the Master of Ceremonies for the annual conference and dinner of the Middletown Chamber of Commerce. In 1990 he was the Master of Ceremonies for a two-day Mid-Fest, an international festival sponsored by the City of Middletown and its Chamber of Commerce. McMurray Communications also joined the Middletown Chamber of Commerce in 1990. McMurray Ex. 2 at 8.

36. For the past twenty-three years Mr. McMurray has been involved with the Ohio Honey Festival which is located in Lebanon, Ohio. He began by volunteering his time to engineer the sound system for the Festival. On six occasions he emceed the event and has been the only Master of Ceremonies for the three-day event for the past three years. Since 1987 he has been on the Board of Directors for the Ohio Honey Festival. Also, he has been the media liaison with television, radio, and newspapers for the Festival. *Id.* at 8.

37. Since 1987 he has volunteered his time to the annual Applefest in downtown Lebanon and has worked in the public service area by helping his wife inform the media about the festival throughout southwest Ohio. For the past ten years he has been a member of the Lebanon Parent Teachers Association volunteering his time for their fund-raising events, including working in approximately six school festivals in various booths. McMurray Ex. 2 at 8-9.

38. In 1984 Mr. McMurray became associated with the Warren County Big Brothers/Big Sisters organization assisting with many of their fund raising activities, such as their annual golf outing, and with public service with the media. He worked with the organization through 1986. He was a past board member for the Southwestern Ohio Leukemia Foundation from 1981 through 1983 which includes Warren County and helped organize an annual leukemia radiothon in 1981 through 1983 which covered Montgomery, Warren, Darke and Butler Counties. Since 1987 he volunteered for many activities for the Juvenile Diabetes Association of southwest Ohio which includes Warren County. These activities pertinent to Lebanon included working at annual fundraising events like their annual bike-a-thon in 1987 and 1988 and their celebrity waiters event in 1990 and 1991. McMurray Ex. 2 at 9. Tr. 27-72.

39. While Mr. McMurray was at WPFB AM-FM, from 1969 through 1972 he taught third grade Sunday School at the local Episcopal church in Middletown. As a volunteer for Junior Achievement in Middletown between 1970

and 1977, he was the adult advisor for ten to fifteen high school Junior Achievement students who wrote, and produced a weekly radio show. He assisted and instructed the students in all phases of radio operation, including production, the sale of commercials to area retail outlets and the purchase of a local radio station for the one-hour program. McMurray Ex. 2 at 3-4.

40. Between 1973 and 1977 Mr. McMurray was an active member of the Middletown Optimist Club and from 1974 to 1976 he was the Activities Chairman for the Club. Between 1969 and 1977 he served on the "Shop Middletown First" Campaign Committee for the Middletown Chamber of Commerce for approximately two years and was a member of the Board of Directors for the Butler County Heart Association between 1970 and 1972. The foregoing community activities pertinent to Middletown occurred within the 1 mV/m signal contour of McMurray Communications' proposed radio station. In addition to Middletown, which is located in Butler County, the 1 mV/m signal contour of their proposed radio station covers the eastern one-third of Butler County, Ohio. McMurray Ex. 2 at 4.

41. Michael McMurray attended Miami University, Oxford, Ohio between 1966 and 1969, majoring in Speech Education with a minor in Radio and Television. In 1966, his radio career began when he was hired by commercial radio station WOXR-FM, operating with three kilowatts in Oxford, Ohio, as a disc jockey on a part-time basis during the school year, and on a full-time basis during the summers. He performed many different jobs at WOXR-FM, including disc jockey and news director, and did sales and production work. He worked at WOXR-FM from 1966 to 1969. While attending Miami University he also worked from 1967 to 1969 for radio station WMUB-FM, a public radio station licensed to the University. His work for WMUB-FM was part-time without pay as part of the curriculum. The work included news and commercial writing and radio announcing. McMurray Ex. 2 at 2-3.

42. In 1969, McMurray was hired by radio stations WPFB AM-FM located in Middletown, Ohio. WPFB (AM) operated with one kilowatt daytime while WPFB-FM operated with sixty kilowatts. He was employed by WPFB AM-FM between 1969 and 1977 and started out selling advertising time. In 1972 he was promoted to Program Director of WPFB AM-FM and was responsible for the hiring, firing and management of approximately 22 people. He ran all sales meetings and was responsible for all house accounts, regional and national accounts. Additionally, McMurray was responsible for the station license renewal procedures for five years. His other duties included play-by-play of college and high school sports events. McMurray Ex. 2 at 3-4.

43. In 1977 McMurray was hired by radio station WHIO-AM in Dayton, Ohio where he worked from 1977 through 1982. He was hired as a talk show host and then promoted to Program Director in 1979. As Program Director, he was responsible for the implementation of the station's program format, for the "on air product" of the station and for the hiring, firing and management of approximately ten to twelve people. McMurray Ex. 2 at 4. While he worked at WHIO-AM, which operated with five kilowatts, from time to time he made commercials and performed some news reporting for WHIO-TV in Dayton. *Id.*

44. In 1982 Mr. McMurray was hired by radio station WVUD-FM, Kettering - Dayton, Ohio which operated with fifty kilowatts. He worked for WVUD-FM from 1982 through 1986. Hired as Program Director, he was responsible for the implementation of the station's program format and for the resulting air product. Promoted to Operations Manager in 1983, he was responsible for the hiring, firing, and management of approximately forty people, including ten to twelve professionals and thirty students who were paid for their services. McMurray Ex. 2 at 4-5.

45. In 1986 Mr. McMurray was hired by radio station WCKY-AM, a fifty kilowatt station in Cincinnati, Ohio, as the public relations-promotion director. Since 1987, he has been working for WCKY-AM as a talk show host and Executive Producer. In this position he is responsible for clearing, researching and implementing topics for the station's talk shows and is in charge of all producers at WCKY, numbering seven persons. He evaluates their performance and makes recommendations in hiring and firing decisions. He also hosts a morning talk show, Monday through Friday, and as the station's Public Service Director, is responsible for the editing and broadcast of public service announcements. McMurray Ex. 2 at 4-5. In the event of a grant of their application, McMurray will terminate his employment with radio station WCKY, Cincinnati, Ohio, in order to fulfill his commitment to be the fulltime General Manager of the proposed radio station. McMurray Ex. 2 at 10.

Mrs. McMurray

46. Mrs. McMurray will be the full-time Sales Manager of the Lebanon station and will devote a minimum of forty (40) hours per week to her duties as Sales Manager. As Sales Manager, she will have overall responsibility for putting together and executing a sales program for the station. This will involve setting rates and designing sales packages for potential clients. She will be responsible for the management of the sales staff including hiring and firing and for budgeting. McMurray Ex. 3 at 1; Tr. 151, 153, 155-157, 183-184, 200. As a General Partner, she will share with her husband responsibility for making decisions on matters affecting station policy. McMurray Ex. 3 at 1. Tr. 155.

47. Mrs. McMurray graduated from Ohio State University in 1968 with a Certificate of Dental Hygiene from the College of Dentistry. Upon receiving her state dental board license she started work in 1968 for Dr. Paul C. Unverferth in Dayton, Ohio as a full-time dental hygienist and worked for him until 1980. Since 1980 she has worked for Community Dental Care, Incorporated, a group practice in Lebanon, Ohio. She has worked part-time for this group as a dental hygienist and until three years ago was responsible for supervisory tasks including the preliminary interviewing for all hiring, advertising for these positions and making initial recommendations for hiring.

48. In the event, the McMurray Communications application for the Lebanon radio station is granted, she will terminate this part-time work. She has advised Community Dental Care about her intentions to work full-time at the proposed radio station. McMurray Ex. 3 at 3-4.

49. In 1986 Mrs. McMurray became an independent sales representative for Newton Manufacturing Co., a full-line advertising specialty company. She built her clients completely on her own through "cold" calls. She works

with approximately thirty various companies and organizations on their marketing strategies and spends approximately one day a week on this work, working out of her residence. In the event the McMurray Communications application is granted, she will terminate this part-time work. She has no employment contract with the company and may freely leave this work at any time. McMurray Ex. 3 at 4.

50. In 1987 Mrs. McMurray and her father formed McNik & Associates located in Lebanon. They are sales representatives for four industrial accounts selling to manufacturing companies in the Warren, Hamilton, Butler and Montgomery Counties area. Working from her residence, she calls directly on purchasing agents of these companies to represent and sell their products. She built her account list with this company through "cold" calls also and is responsible for her customers' orders and follow up on product. She keeps track of orders sold and commissions received. In the event the McMurray Communications application is granted, she will terminate this part-time work, to which she devotes about a day and a half per week, and has advised her father of this decision. In the event of a grant of their application she will terminate any employment she may have at that time and will adjust her present and future schedules with respect to any other activities as necessary in order to fulfill her full-time commitment to their proposed Lebanon radio station. McMurray Ex. 3 at 4-5, 10.

51. With the exception of three years when she was in college at Ohio State University and one year when she lived in Dayton, Ohio, Marilyn McMurray has lived in Lebanon, Ohio since her birth in 1947 and intends to continue to reside there. McMurray Ex. 3 at 1-3.

52. From 1979 through 1982 she was a board member of the Lebanon United Methodist Preschool which has about 100 students. As a member-at-large for four years she helped establish school policy, hiring guidelines, and fund-raising activities. *Id.* at 6.

53. She has been a member of two Lebanon groups involved with drug and alcohol awareness programs for the school and community. In 1987 she was a member of the Berry Intermediate School Core Team, a group of people who were responsible for setting guidelines for drug awareness and counseling programs within the school. This group included teachers, administrators and parents. Currently, she is a Trustee of Community P.R.I.D.E., a Lebanon organization. This group is a nonprofit organization formed and actively involved with drug education, awareness and prevention within the community. As a trustee she is involved in making policy on what directions this group will take. She was involved with the decision to educate three people to teach "TWIKA" (Talking with Your Kids about Alcohol). These individuals volunteer to speak to clubs and churches in the Lebanon area. Community P.R.I.D.E. sponsored a "Safe Home" program; asking people to pledge that they would not serve alcohol in their homes to underage children and also actively supported the National Red Ribbon Campaign, a national drug awareness week in October. She helped distribute Campaign posters to local businesses. Mrs. McMurray has been a member of Community P.R.I.D.E. since 1986 and a trustee since 1987. McMurray Ex. 3 at 6-7. Tr. 198-199.

54. She has been a member of the Lebanon Parent Teachers Association for approximately ten years. She has helped with annual fund-raising for this group to support the local schools. As a member of the Parent Teachers Association she worked at the annual fund-raising carnivals sponsored by Dunlavy Elementary and Louisa Wright Elementary, both Lebanon schools, worked in booths at these events and provided baked goods for the cake-walk booth. Tr. 176. In 1986 and 1987 Mrs. McMurray was a member of the Berry Boosters which supports sports programs in the Lebanon junior high school. With the Berry Boosters, she helped in their booth at the Applefest selling pizza. The money received from these Booster efforts is used to help buy equipment for the sports programs at Berry Junior High School in Lebanon. McMurray Ex. 3 at 7-8.

55. In the spring of 1990 Mrs. McMurray was asked to be the community representative for the Warren County Area Progress council to help select teachers in the Lebanon schools for the "Excellence in Teaching Awards". The Superintendent of Lebanon Schools, a representative of the Warren County Area Progress Council and Mrs. McMurray made up this selection committee. McMurray Ex. 3 at 8.

56. Since 1987 Mrs. McMurray has been a member of the Board of Directors of Lebanon Applefest and Chairman of Publicity. This is an annual fall festival which promotes Lebanon businesses and the Warren County Fruit and Vegetable Growers Association. Besides publicizing the festival to the media, she also is involved in fund raising among the local merchants and industries to help support this annual festival. The day of the festival she is responsible for overseeing booth set-up and placement for a segment of the booth space. *Id.* at 8.

57. Since 1988 she has been an active member of the Lebanon Area Business and Professional Women's Association. She has worked with their fund-raising projects which provide scholarships for women returning to school to educate themselves in order to return to the workplace. She worked in the Association's fund raising booths at the Ohio Honey Festival and Kris Kringle Mart, both in Lebanon, and has been active in their annual poinsettia sale. *Id.* at 8.

58. Since 1983 she has been a member of Homesteaders, a home makers group affiliated with the Warren County Agriculture Extension Service. She was Treasurer of the Homesteaders in 1985 and is currently Secretary of this organization which provides nurturing and growth for the family unit. They also raise money and donate funds for 4H awards at the County Fair. McMurray Ex. 3 at 8-9.

59. From 1978 through 1984 Mrs. McMurray was a member of the Lebanon Chapter of the Ohio Children's Conservation League. The League's purpose is to promote family life and children's well-being. The league held monthly meetings and invited various resource people to discuss topics relevant to child development both physically and emotionally. This is a resource group for children's well-being. McMurray Ex. 3 at 9.

60. For twenty years she has been a member of the Lebanon Dickens Carolers a caroling group of local volunteers who perform eight to ten times each year at local nursing homes, festivals and businesses during the holiday season. She was also an active member of the Lebanon Players theater group from 1972 to 1975. This group performs musicals and plays at the high school auditorium for the entertainment of the community. *Id.* at 9.

61. She has been a member of the Warren County Historical Society for approximately three years and the Lebanon Area Chamber of Commerce since January 1988. She has donated her time and talents to fund raising projects in both organizations, including Christmas at Glendower Museum in Lebanon, working on the Great Ohio Bicycle Adventure and annual bake sales. As a member of the Lebanon Chamber of Commerce, she has volunteered by manning a booth for fund raising at the Great Ohio Bicycle Adventure in 1989, an annual bicycle tour that periodically comes through the Lebanon area on their summer tour. She has also entertained as a member of the Dickens Carolers at the annual Christmas Festival sponsored by the Chamber. McMurray Ex. 3 at 9-10, Tr. 177.

Diversification

62. Neither McMurray, Michael McMurray, nor Marilyn McMurray owns any other mass media interest. McMurray Ex. 1 at 1. Mr. McMurray is employed by WCKY-AM, Cincinnati, Ohio as Executive Producer and a talk show host. McMurray Ex. 2 at 9. In the event of grant of McMurray's application, Michael McMurray has pledged to resign his employment with WCKY-AM. McMurray Ex. 2 at 10.

Auxiliary Power

63. McMurray proposes to use an auxiliary power source at its transmitter and studio sites to permit continued operation of the new station in the event normal power is interrupted. McMurray Ex. 4 at 1.

Comparative Coverage

64. All of the areas proposed to be served by the applicants presently receive five or more aural services during both daylight hours and at night. The following are the total areas and populations which the applicants will cover within their respective 1 mV/m contours. (Jt. Ex., pp. 3-10).

Applicant	Area (Sq. Km.)	1980 Population
Julia A. Moore	1,849.5	285,971
William L. Carroll	1,833.1	329,150
Michael A. McMurray & Marilyn A. McMurray, a general partnership, d/b/a McMurray Communications	1,830.7	294,961

CONCLUSIONS

Standard Comparative Issue

Diversification

65. None of the applicants has attributable media interests. Thus diversification is not a factor in the comparative evaluation of the applicants.

Best Practicable Service

Integration (Quantitative)

66. The three applicants all receive 100% quantitative integration credit. Moore has unequivocally pledged to work at least 40 hours a week as the proposed station's general manager. No evidence has been offered by her opponents undercutting her entitlement to full-time credit. The contention that Ms. Moore has a record of starting and leaving businesses is without factual basis. The record reflects that Ms. Moore and her former husband founded and operated six businesses in southwestern Ohio from 1962 to 1989. Moore Ex. 1 at 2. The Moore did not abandon their businesses after they were operating. Rather, they continued to operate their businesses while they founded new ones. At hearing, Ms. Moore explicitly denied that she ceased working at a business once it became successful. Tr. at 64. The evidence in the record supports her testimony. Moreover, Ms. Moore's decision to divest herself of interests in businesses that she and her husband owned when their marriage ended is perfectly understandable and does not call her integration pledge into question.

67. The record also demonstrates that McMurray Communications is entitled to 100% full-time integration credit. Michael McMurray and Marilyn McMurray, the two general partners of the applicant, have committed to working full-time, a minimum of 40 hours per week, as General Manager and Sales Manager, respectively. Each will perform meaningful management and policy functions at the station on a continuing basis and each has delineated his or her managerial and policy functions. Further, the McMurrays have made specific commitments to terminate their other employment and reduce their outside activities to permit them to fulfill their commitments to the station.

68. No evidence has been offered which undermines the McMurray's integration proposal. Moore and Carroll's assertion that Mrs. McMurray's integration proposal should not be credited finds no support in the record. The record unquestionably shows that Mrs. McMurray is not a pawn for her husband. She has participated actively in the preparation and prosecution of their application and will hold a management position recognized by the Commission as exercising policy functions. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965). Moreover, as a general partner, she will share with her husband responsibility for making decisions on matters affecting station policy. The fact that she, as well as her husband, may be required to perform alleged nonmanagerial activities ignores the fact that in a small market radio station, the owners are going to be involved in all aspects of the station's operation, even to the extent of answering the telephone when necessary. To contend that Mrs. McMurray will not be involved in the management of the station is entirely without basis. See *Debra D. Carrigan*, 100 FCC 2d 721, 738 (Rev. Bd. 1985), rev. denied, FCC 86-317, released July 14, 1986; see also *Rancho Mirage Radio*, FCC 92R-2, released January 17, 1992, paragraph 12. 100% quantitative integration credit is awarded.

69. Carroll is entitled to 100% quantitative integration credit for his proposed fulltime participation as general manager. He has committed to terminate all employment in order to effectuate his integration proposal with the exception of serving no more than 15 hours per week as a

pastor. Carroll has met his burden of demonstrating that he can and will effectuate his integration proposal. As reflected in the record, Carroll will reduce his hours devoted to his duties as pastor from 25 to 15 by allocating more responsibility to the assistant pastor. Also, Carroll is already training approximately six individuals who will assist in the ministry. Carroll's sole responsibility if his application is granted will be to prepare others for the ministry and to preach on Sunday (Tr. 83); Carroll Ex. 1 at 1.

Integration (Qualitative)

70. Of the three applicants, Carroll runs third. Carroll is entitled to 15 years residence within the service area but receives no credit for civic participation. The Commission has made clear that civic activities are to be considered with local residence as a unified comparative factor. *Ronald Sorenson*, 6 FCC Rcd 1952 (1991). Carroll also receives minimal broadcast credit for his production of religious programs over a 2 year period, 2 year employment as a part-time disc jockey and officer/trustee of a broadcast station. Carroll's enhancement is far weaker than that of Moore and McMurray Communications.

71. As between McMurray Communications and Moore, McMurray Communications has demonstrated superior enhancement. Moore has lived in Lebanon for 22 years. However, Mrs. McMurray has lived in Lebanon for almost twice as long while her husband has lived in the community for 18 years and within the service area for his remaining 27 years. Therefore, the McMurrays enjoy a local residence preference. Also, the McMurrays' record of civic activities is far more extensive than that of Moore. In this regard, it is difficult to discern from the vague and overly brief description of Moore's activities whether many of the listed activities involved anything more than membership. Mere membership in an organization, without participatory conduct, is undeserving of enhancement credit. *Linda Crook*, 3 FCC Rcd 354 (Rev. Bd. 1988). Moore's involvement as a patron of the Warren County Historical Society and a a member of the Chamber of Commerce prior to 1990 fall into this category. Also, no specific information has been provided as to what activities she was "actively" involved in with the East Enders or the Warren County Humane Association. The McMurrays' superior local residence and civic activities entitles it to substantial enhancement credit for this factor. *See Rebecca L. Boedker*, 6 FCC Rcd 2557 (1991). The McMurrays are also entitled to enhancement for Mr. McMurray's substantial broadcast experience. While Moore's female status is a significant factor, it is not dispositive here. Female status, unlike minority status, is accorded less weight than the local residence factor. *Horne Industries, Inc.*, 98 FCC 2d 601, 602-603, para. 4 (1984). Moreover, its significance is further diminished by the fact that McMurray Communications is entitled to 50% female enhancement. McMurray Communications is clearly entitled to an integration preference.

Auxiliary Power

72. All three applicants propose auxiliary power. All receive the slight credit accorded for such proposals and all are equal under this criterion.

Comparative Coverage

73. When areas and populations are well-served, the Commission has awarded a slight coverage preference to applicants proposing substantially greater overall coverage than their opponents. *Simon Geller*, 90 FCC 2d 250, 268-269, 276 (1982) (subsequent history omitted) (coverage superiority of four times more area and 315,000 persons). For less significant differences, a very slight preference has been awarded. *Barton Broadcasting Co.*, 104 FCC 2d 785, 791 (Rev. Bd. 1986) (coverage difference of 44,215 persons of 27%); *Family Broadcasting Group*, 93 FCC 2d 771, 779 (Rev. Bd. 1983) (coverage differences of 42,000 persons or 8%, 140,000 persons of 34%, and 180 persons or 44%). Finally, where the differences are insignificant, no preference is awarded. *Susan S. Mulkey*, 4 FCC Rcd 5520, 5521 (1989) (coverage difference of 36,206 persons or 2%); *Barnes Enterprises, Inc.*, 69 FCC 2d 1957, 1962-1963 (Rev. Bd. 1978), *review denied*, FCC 79-451, released July 15, 1979 (coverage difference of 12,000 persons of 5%). While a close call, Carroll merits a very slight preference over Moore and a very slight preference over McMurray in population coverage. The differences between Moore and McMurray are too slight for either to merit a preference as to each other.

Comparative Summary

74. Carroll has the weakest integration enhancements and is ranked third. Carroll's very slight coverage preference does not improve its comparative posture *vis a vis* McMurray Communications and Moore. As between Moore and McMurray Communications, the integration proposal of McMurray Communications is superior and its application is granted.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[3] the application of Michael A. McMurray and Marilyn A. McMurray, a General Partnership, d/b/a McMurray Communications for a construction permit for a new FM station on Channel 247A in Lebanon, Ohio IS GRANTED; and the applications of Julia A. Moore and William L. Carroll ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] The application of Nancy A. Fenton was dismissed, in the *HDO* ¶ 8. The applications of Lebanon Communications Limited Partnership and John E. Morris and Lawrence R. Baker d/b/a Morbak Communications were dismissed pursuant to their requests. *Order*, FCC 90M-2780, released September 5, 1990. The application of The Living Word was dismissed for failure to prosecute its application. *Order*, FCC 90M-2837, released September 10, 1990. The application of William L. Combs d/b/a Combs Communications was dismissed pursuant to his request.

Order, FCC 90M-2939, released September 17, 1990. The application of Body of Christ Cincinnati was also dismissed pursuant to its request. *Order*, FCC 91M-1235, released April 10, 1991.

[2] Lebanon has a population of approximately 9 to 10,000 people. Tr. 300. The McMurrays intend to operate a "mom and pop" small market radio station. Tr. 299. They plan to operate with four full-time employees -- general manager - Mr. McMurray; sales manager - Ms. McMurray; program director and an office manager. Tr. 255. They also intend to employ part-time board operators/announcers (Tr. 255) and at some point sales people working on a Commission basis. Tr. 151, 153-154, 299.

[3] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

APPLE COMMUNICATIONS — File No. BPH-880519NH

For Construction Permit
for a New FM Station on Channel 229A
in Sebastopol, California

MEMORANDUM OPINION AND ORDER

Adopted: February 10, 1992; Released: February 20, 1992

By the Commission:

1. The Commission has under consideration an Application for Review filed on August 20, 1990 by Apple Communications ("Apple"). By way of background, Apple's application for a construction permit for a new commercial FM station in Sebastopol, California, was returned by the staff as not sufficient for tender, because it lacked a full scale transmitter site map (7.5 minute). *See Letter from the Chief, FM Branch, Audio Services Division, to Gerald N. Pearlman*, August 18, 1988 (reference 8920-MT/PAD).[1] Subsequently, Apple requested reconsideration of that action, arguing that the *Public Notice* did not require a full scale map.[2] Rather, Apple contended that the *Public Notice* contained merely a suggestion that full scale site maps "should" be used. Apple's petition for reconsideration was denied in the Mass Media Bureau's ("Bureau") Hearing Designation Order ("*HDO*") designating for comparative hearing nineteen mutually exclusive applications for the Sebastopol facility. *See Beth Knight*, 5 FCC Rcd 3927 (MM Bur. 1990). Although Apple argued on reconsideration that the *Public Notice* does not mandate use of a full scale map, the Bureau disagreed, citing *FM Transmitter Site Map Submissions*. Noting that Apple submitted a 30 percent reduced section of a 7.5 minute USGS site map and no copy of the entire site map, the Bureau concluded that the submitted map did not comply with the Commission's site map requirements. Although Apple had resubmitted its application with a full scale site map in its reconsideration request, it did so after the close of the applicable "window" period. The resubmitted application was therefore held to be untimely pursuant to the "hard look" processing standards and Apple's petition was denied.

2. In its application for review, Apple first argues that by insisting on a full scale map the Bureau has imposed on it a requirement which has not previously been clearly or consistently applied. According to Apple, The *Public Notice* sets forth six "true" requirements, but not a requirement that a full scale map, or any portion thereof, be submitted. Application for Review, at p.5. Apple contends that in "case after case" involving applications returned for lack of a full scale site map, one of the "true" requirements listed in the *Public Notice* was also absent.[3] *Id.* at 7. Further, Apple cites our policies in the Domestic Public Cellular Service, "an area equally if not more stringent as regards the imposition of 'hard look' requirements for the submission of maps," asserting that, in that service, only concerns about the legibility of site coordinates and contour lines, as opposed to map reduction, have led to return of applications.[4] *Id.* Apple also cites

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[1] In order to be deemed tenderable pursuant to the FM "hard look" processing standards instituted by the Commission in the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985), all commercial FM applications must include a transmitter site map meeting requirements set forth in an April 5, 1985 *Public Notice* ("*Public Notice*") which established the site map criteria. The specific requirement that applicants submit a full scale map, or portion thereof, is set forth in the *Public Notice*. Subsequently, the Commission in *FM Transmitter Site Map Submissions*, 1 FCC Rcd 381 (1986) held, *inter alia*, that the map requirements had not been properly published in the *Federal Register*. The *Public Notice* thereafter was published in the *Federal Register* on December 23, 1986. *See* 51 Fed. Reg. 45945. Apple's application was filed on May 19, 1988.

[2] The *Public Notice* states in pertinent part:

> In order to allow the Commission's processing staff to verify the correctness of the geographic coordinates provided in an application, it is necessary for this site map to show along the printed margin of both axes at least two coordinate markings, specifically labeled by the USGS, one on either side of the marked site. Additionally, a scale of kilometers or miles (kilometers, if available) and all of the identifying map information must be included. The site should be plotted on a full scale map, and all of the contour lines should be clearly visible. Faded, smudged or otherwise illegible maps are unacceptable. Photocopies are acceptable in lieu of actual USGS Maps, provided they are clear, dark and legible. It is not necessary to submit an entire map (although this is perfectly acceptable), but only as much as is necessary to fully comply with the requirements described above.
>
> In certain cases it may be inconvenient to provide a full scale photocopy which includes both the site and the margins. This can occur when the site lies towards the center of the map. In this case the following alternative is acceptable. Provide a full scale copy of the section of the map containing the site. This copy must include either four of the standard printed crossmarks or one margin and two cross-marks. Fine lines should be drawn between the marks in such a fashion as to enclose the site. Each of these lines should be labeled with the appropriate latitude or longitude. This full scale map section must include all the information specified in the previous paragraph. In addition, a reduced copy of the entire map must be included to allow the Commission's staff to verify that the lines have been correctly labeled.
>
> If the above requirements are not met, the application will be returned without further review....

51 Fed. Reg. 45945.

[3] Apple cites *Roxanne Givens*, 4 FCC Rcd 6756 (M.M. Bur. 1989).

[4] Apple cites *Petitions for Reconsideration of the Return of Round IV Cellular Applications for Having Defective Maps*, 103 FCC 2d 366, 368 (1986) ("*Round IV Reconsideration*"); *James H.*

two FM cases in which it contends reduced maps were submitted but the Bureau nevertheless provided opportunities to amend, *VBM Enterprises, Inc. et al.*, Hearing Designation Order in MM Docket No. 85-278 (released October 4, 1985), and *Milyana Broadcasters et al.*, Hearing Designation Order in MM Docket No. 85-276 (released September 11, 1985). Apple further argues that in *FM Transmitter Site Map Submissions* the Commission did not interpret the *Public Notice* language to raise the "suggestion" of a full scale map to a "commandment." *Id.* at 9. Finally, Apple contends that the *Public Notice* makes it clear that the criterion for acceptability of any site map is a set of clearly designated coordinate markings permitting highly accurate staff verification, which implies that satisfaction of this criterion, and not the means of doing so, is the test of the acceptability of an applicant's site map. Apple submits affidavits from two consulting engineers which, according to Apple, explain how to satisfactorily verify the site elevation and geographic coordinates from the reduced map.

3. The Commission's "hard look" processing standards regarding tenderability of FM broadcast applications have always required the submission of a full scale site map or a portion thereof. *FM Transmitter Site Map Submissions*, 1 FCC Rcd at 381. That policy has been consistently applied by the staff since the initiation of these standards[5] and Apple's application, because it lacked the requisite full scale map, is clearly untenderable.

4. While the *Public Notice* indicates that a site "should" be plotted on a full scale map, it also clearly indicates that if neither of the alternative methods provided for utilizing a full scale map are met, an application will be returned "without further review." *FM Transmitter Site Map Submissions*, 1 FCC Rcd at 382. Nowhere in the *Public Notice* is there any indication that submission of a reduced site map alone is permissible.

5. Apple's argument that the full scale map requirement has not been consistently applied is not persuasive. In *Roxanne Givens*, an application was held to be untenderable because the topographic elevation contours of the site map were illegible, and, accordingly, the elevation could not be determined. Therein, the Bureau noted that the map had been reduced, but illegibility alone was stated as the basis for rejection of the application. Reliance by the staff on a single tender defect in returning an application does not, of course, establish that other tender defects in the applications might not also have been fatal. Regarding the *VBM* and *Milyana* FM cases cited by Apple, both involved applications filed prior to adoption of our current "hard look" processing system. These cases are inapplicable because the processing rules which were their basis have been dramatically changed. *See, e.g., Matthew D. Wiggins, Jr*, 1 FCC Rcd 399 (1986).

6. We also find unavailing Apple's reliance on Commission policies and decisions in the cellular service to support its position that reduced maps are permissible and that their use should not render an FM broadcast application untenderable. The fact that both services use strict application processing criteria does not establish that the same elements of an application which are subject to strict review in one service are, or should be, subject to strict review in the other service. In any event, as with FM applications, we have held that cellular applications with reduced scale maps are unacceptable for filing. *See Round IV Reconsideration*, 103 FCC 2d at 3682. *Accord Winnebago Cooperative Telephone Assoc.*, 5 FCC Rcd at 1248.[6] Regarding the other cases cited by Apple, the fact that the Commission dismissed a cellular application for being illegible, *REM Communication*, does not mean that the map-scale requirement is not enforced. Also, although the staff in another case, *James H. Summers*, accepted a cellular application that contained an illegible, reduced scale map, that original application did include the proper full scale, legible map. Finally, we note that to the extent the staff decision in *Sun Communications* is inconsistent with Commission precedent, *see Round IV Reconsideration*, it would be of no precedential value in the cellular service, let alone the FM service.

7. Finally, with regard to Apple's engineering affidavits, they do not persuade us that the reduced map submitted with Apple's application permits verification of the proposed site elevation and coordinates with the requisite degree of certainty we desire. The affidavits simply detail the methodology used to ascertain coordinates from a site map. These procedures may be utilized regardless of the scale of the site map studied. As stated in the *Public Notice*, the purpose of requiring site maps is to permit the processing staff to verify an applicant's site information. The Commission required submission of a full scale map because we desired *maximum* accuracy in the verification process for FM applications. It is axiomatic that, as the scale of a site map is reduced, the accuracy of any site verification study is correspondingly reduced. Thus, study of a 30% reduced site map does not permit the staff to verify an applicant's site information with the degree of accuracy contemplated by the Commission in the *Public Notice*.

8. ACCORDINGLY, IT IS ORDERED, That the Application for Review filed on August 20, 1990, by Apple Communications IS DENIED.[7]

Summers, 2 FCC Rcd 1559 (C.C. Bur. 1987); *Sun Communications, Inc.*, 4 FCC Rcd 6429 (C.C. Bur. 1989); *Rem Communication*, 3 FCC Rcd 3705 (1988); and *Winnebago Cooperative Telephone Assoc.*, 5 FCC Rcd 1247 (C.C. Bur. 1990).

[5] *See Letter to Lamoille Broadcasting and Communications Limited Partnership*, reference 8920-CJS (Chief, FM Branch, March 15, 1988), *recon. denied, Letter to Lamoille Broadcasting and Communications Limited Partnership*, reference 8920-JD (Chief, Audio Services Division, January 10, 1991); *Letter to Tharrington, Smith & Hargrove*, reference 8920-F, Long (Chief, FM Branch, June 15, 1989), *recon. denied, WCCR Broadcasting Limited Partnership*, 6 FCC Rcd 2554 (M.M. Bur. 1991); *Letter to Cohen & Berfield*, reference 8920-F, Hodge (Chief, FM Branch, September 18, 1990), *recon. denied, Lion's Share Broadcasting*, 6 FCC Rcd 4465 (M.M. Bur. 1991).

[6] We have recently declined to enforce a revised version of the full scale map requirement in the cellular service because the rule, as modified, was ambiguous. *See Applications for Review and Reconsideration of the Return of Rural Service Area Cellular Applications for Having Defective Maps*, 6 FCC Rcd 5387 (1991). That case is not relevant here since, as noted above, the FM map requirements were clearly set out in the 1985 *Public Notice*.

[7] An applicant in the Sebastopol comparative proceeding, Bayside Broadcasting Inc. ("Bayside"), filed an opposition to Apples's Application for Review. Bayside contends that Apple's

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Donna R. Searcy
Secretary

application for review appeals an interlocutory hearing action and is therefore subject to the five-page limit specified in 47 C.F.R. § 1.115(j), and that the two engineering exhibits in Apple's pleading should have been submitted at an earlier stage of the proceeding. In view of the foregoing, we do not reach these issues.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

800 MHz Private Land Mobile Radio Stations Managed or Operated by Accent Radio Service, Inc., in or near San Diego, California — Case No. LGF - 90062

ORDER

Adopted: February 11, 1992; Released: February 11, 1992

By the Chief, Private Radio Bureau:

1. Accent Radio Service, Inc. ("Accent") is the licensee of conventional 800 MHz private land mobile radio station WNFZ-985 located in or near San Diego, California, as well as the manager and/or operator of various other 800 MHz systems located in or near San Diego, California.

2. On March 20, 1990 an application (File No. 693298) was filed to assign each of the following stations to Advanced MobileComm of Southern California, Inc. ("AMI"): WNFZ-985, licensed to Accent; WNBF-503, licensed to Lori Purkerson and M. A. Wolfe; WNJB-537, licensed to Palomar Transit Mix; WNAJ-337, licensed to Palomar Transit Mix; WNIY-204, licensed to Sun Valley Trucking, Inc.; WNFF-281, licensed to Phyllis Pavone; WNGK-263, licensed to Edco Disposal Corp.; and other stations managed and/or operated by Accent sharing each of two conventional repeater systems on the frequencies 859.600 and 865.550 MHz. This application was filed pursuant to the terms of a certain Purchase and Sale ("P & S") Agreement dated December 21, 1989 between Accent and AMI.

3. Accent intended to file additional applications for assignment on behalf of other licensees pursuant to this P & S Agreement. These licensees included C. F. Farming, Inc. (station WNJU-810) and Plavan Petroleum, Inc. (station WNJU-811).

4. The Chief, Private Radio Bureau and Accent have entered into a Consent Agreement that resolves compliance matters that had been designated as Case No. LGF-90062 with respect to proposed transactions involving stations licensed and/or managed or operated by Accent.

5. I have reviewed the terms of the Consent Agreement and evaluated the circumstances of this case. I believe that the public interest would be served by approving the Consent Agreement, the terms of which are incorporated herein by reference.

6. Accordingly, IT IS ORDERED that the Consent Agreement IS ADOPTED.

7. IT IS FURTHER ORDERED that the Private Radio Bureau's compliance Case No. LGF-90062, involving investigation of Accent and licensees and systems managed and/or operated by Accent, IS TERMINATED.

8. IT IS FURTHER ORDERED that this *Order* is effective upon the date of its adoption.

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Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies Transmittal No. 578
Tariff F.C.C. No. 2

ORDER

Adopted: February 10, 1992; Released: February 12, 1992

By the Deputy Chief, Common Carrier Bureau:

1. By Transmittal No. 578, the Ameritech Operating Companies (Ameritech) introduce Ameritech Directory Search (ADS), a new service which will permit Ameritech's customers to gather data electronically from the directory assistance listings without the assistance of an operator or reference to the printed white pages. Access to listings for the Ameritech region will provide data necessary for Ameritech's customers to introduce a national on-line service to their end users. Transmittal 578 Description and Justification (D&J) at 1. Neither Ameritech's customers nor their end users will have the ability to change, modify, or delete the information in the ADS database, and there will be no reverse search capability. *Id.* Ameritech uses the following rate elements to price ADS: a Monthly Service Fee, a user sensitive Screen Charge, a Service Establishment Charge, and a User Identification charge. Transmittal 578 is scheduled to become effective February 13, 1992.

2. On November 27, 1991, MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate Transmittal 578,[1] arguing that the rates for ADS are significantly above their unit cost, and that overall, the rates generate revenues in excess of Ameritech's allowed rate of return. MCI Tr. 555 Petition at 1; MCI Tr. 578 Petition at 2. In particular, MCI alleges, the usage sensitive Screen Charge is significantly above its unit cost. MCI also asserts that Transmittal 578 reflects an unjustified 35 percent increase in the rate-to-cost ratio than that expressed in the initial filing. MCI Tr. 578 Petition at 5. MCI also charges that Ameritech manipulated the net revenue test to the detriment of its customers. *Id.* at 2, 5-6.

3. Ameritech filed an opposition to MCI's Transmittal 578 petition on December 12, 1991, stating that the net revenue test demonstrates that ADS rates do not recover an excessive amount of revenues above direct costs. Ameritech Opposition at 4-5. Under the net revenue test, Ameritech asserts, ADS rates would provide an approximate $86,000 contribution to overhead expenses on a present value basis over two and one-half years. *Id.* Ameritech also maintains that the Commission should consider the net revenue test, as well as rates in effect for similar service offerings, in determining whether ADS' rates are unreasonable. *Id.*

4. The Common Carrier Bureau has reviewed Ameritech Transmittal No. 578 and the associated pleadings. We conclude that an investigation is not warranted at this time.

5. Accordingly, IT IS ORDERED that the petition to suspend and investigate Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal No. 578, filed by MCI Telecommunications Corporation, IS DENIED.

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Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[1] This petition incorporates the arguments raised by MCI in a petition filed August 30, 1991, requesting suspension of Transmittal 555, Ameritech's original ADS filing. MCI Petition at 2, n.2. Transmittal 555 was subsequently withdrawn by Ameritech.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-346

In the Matter of

Intelligent Networks

ORDER

Adopted: February 10, 1992; Released: February 11, 1992

Comment Date: March 3, 1992
Reply Comment Date: April 6, 1992

By the Deputy Chief, Common Carrier Bureau:

1. On January 27, 1992, six of the Bell Operating Companies (BOCs) filed a joint motion seeking a four week extension of the deadline for filing comments and reply comments in this proceeding until March 17, 1992, and April 20, 1992, respectively.[1] On January 31, the United States Telephone Association (USTA) filed a similar request, seeking a six week extension of the filing dates for comments and reply comments, until March 31, 1992, and May 4, 1992, respectively. Both the BOCs and USTA state that they need additional time because of the importance and complexity of the issues presented. In addition, they state that just prior to the comment due date, the Information Industry Liaison Committee (IILC) will hold an industry forum, in which topics critical to intelligent network planning will be discussed by key industry representatives. The BOCs and USTA state that it would help to produce a better record if all interested parties were given several weeks following the industry forum to consider the contributions made by various representatives before drafting responses to the Commission's *Notice*.

2. On February 4, 1992, the Coalition of Open Network Architecture Parties (CONAP) filed an opposition to the BOCs' joint motion for extension of time. CONAP states that the BOCs have not established a good cause showing for their requested extension since there is no guarantee that the material presented at the IILC forum will bear directly on the particular issues identified by the Commission in this proceeding. A four week extension of time, it says, would unnecessarily delay this proceeding. On February 5, 1992, MCI Telecommunications Corporation (MCI) filed comments in support of USTA's request for an extension of time. MCI states that the issues in this proceeding are important and complex, and that more time would give interested parties an opportunity to gather additional information that might prove useful to the Commission in the resolution of issues addressed in the *Notice*.

3. It is the policy of this Commission that extensions of time shall not be routinely granted.[2] However, in light of the importance of the issues presented in this proceeding, and in the interest of a full record, we believe that the public interest would be served by allowing all interested parties additional time for filing comments and reply comments. Therefore, we grant the motions of the BOCs and USTA in part, and extend the deadlines for filing comments and reply comments by two weeks, until March 3, 1992, and April 6, 1992, respectively. We do not extend this grant for a longer period of time because we do not wish to unnecessarily delay this proceeding, and we believe that a two week extension should provide interested parties an ample initial opportunity to incorporate information gained from the IILC forum into their comments.

4. Accordingly, IT IS ORDERED, pursuant to sections 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(j) and 155(c), and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. Sections 0.91 and 0.291, that the motions of the BOCs and USTA are GRANTED IN PART and otherwise DENIED. The deadline for filing comments is extended to **March 3, 1992,** and the deadline for filing reply comments is extended to **April 6, 1992.**

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Carl D. Lawson
Deputy Chief, Common Carrier Bureau

[1] This proceeding was initiated by a *Notice of Inquiry*, released December 6, 1991. *See* Intelligent Networks, 6 FCC Rcd 7256 (1991).

[2] *See* 47 C.F.R. Section 1.46(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 12, 1992

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON NYNEX PETITION FOR WAIVER OF ONA TARIFFING ORDERS

CC Docket No. 89-79
CC Docket No. 88-2

On February 7, 1992, NYNEX filed a petition for waiver of the Commission's ONA tariffing orders in CC Docket Nos. 88-2 and 89-79, which require the Bell Operating Companies to file federal tariffs for all of the basic service elements listed in their approved ONA plans. This waiver petition requests that NYNEX be permitted to delay the filing of a tariff for its Trunk Group Make Busy service until December 1, 1992, so that it may complete its development process. It also requests a delay until August 3, 1992, for the federal tariffing of Pulsenet, to complete the development of the necessary methods and procedures.

Interested parties should file comments on the petitions by **February 27, 1992,** and reply comments by **March 9, 1992,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Mark S. Nadel, Common Carrier Bureau, FCC, Room 544, 1919 M St., N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Copies of the petitions can be obtained from the Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally,* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Mark Nadel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-6363.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-24

In the Matter of

Southern New England Telephone Company — Transmittal Nos. 531 and 533

Tariff F.C.C. No. 39

Line Information Database

ORDER

Adopted: February 10, 1992; Released: February 10, 1992

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. Southern New England Telephone Company (SNET) has filed a petition for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to establish rate elements for transmission services connecting customers to the carriers' common channel signaling networks (CCS) and to establish rate elements for access to the data in their line information databases (LIDB). SNET has also filed tariff transmittals to introduce CCS access and LIDB. These tariff revisions are scheduled to take effect on February 11, 1992. MCI Telecommunications Corporation (MCI) filed petitions against both transmittals.

2. For the reasons discussed below and in the *Southwestern Bell LIDB Order*,[1] we hereby grant the requested waiver. We also suspend the SNET transmittals for one day, impose an accounting order, and initiate an investigation of the transmittals.[2]

II. WAIVER PETITION

A. Background

3. LIDB[3] refers to a database created by local exchange carriers (LECs). These databases are interconnected in order to enable LECs to share with each other and with third parties data on the account status[4] of LEC joint use calling cards,[5] as well as information on line numbers, such as third party billing exceptions.[6] This information is stored in LIDB and updated by the LECs on a regular basis. LIDB query service will enable LEC customers such as interexchange carriers (IXCs) to query the database to determine whether a caller is the authorized user of a valid LEC joint use card, or whether a particular telephone number can accept collect or third-party billed calls, before transmitting any call using that card or line number.

4. Both the LECs and the IXCs have developed CCS networks which operate as part of their switched networks to assist in the routing and delivery of telecommunications traffic. Many of the carriers' services that use CCS network capabilities (including LIDB) will require the LECs and their customers to interconnect their CCS networks. CCS interconnection service requires at a minimum one 56 kilobit per second (kbps) link connecting an IXC's CCS network to the signaling transfer points (STPs) in the LEC's network. This link can be used by the LEC to transmit out-of-band signaling information to IXCs, which provides IXCs with faster call set-up than is possible with in-band signaling. CCS interconnection service also enables the IXC to transmit queries to LECs' STPs and thence to LEC databases, like the queries an IXC sends to LIDB for purposes of calling card validation or third party billing information.

5. On October 4, 1991, the Common Carrier Bureau released a decision granting the petition for waiver filed by Southwestern Bell to establish new rate elements for provision of LIDB services.[7] Specifically, the Bureau permitted Southwestern Bell to recover the costs of LIDB query service through two separate charges, one which recovers the costs of the service control point (SCP) which is the database itself, and one which recovers the costs of the STP facilities and transmission lines dedicated exclusively to LIDB.[8] We also permitted Southwestern Bell to recover the costs of CCS interconnection service through two new charges within the Part 69 local transport access element. The first of these is a charge per port for the STP port in which the transmission facility between the IXC's signaling point of interconnection (SPOI) and the LEC's signaling network terminates. The second subelement is a charge per line which recovers the costs of the transmission facility itself.[9] We granted those waivers on an interim basis, pending the outcome of the Commission's rulemaking proceedings in CC Docket Nos. 91-115[10], 91-141[11] and 91-213.[12]

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[1] Southwestern Bell Telephone Company, Petitions for Waiver of Part 69 of the Commission's Rules, 6 FCC Rcd 6095 (Com.Car.Bur. 1991) (*Southwestern Bell LIDB Order*).

[2] *See also* Local Exchange Carriers, Line Information Database, *Order*, DA No. 91-1637, (released Dec. 30, 1991) (Com.Car.Bur.).

[3] Unless otherwise indicated, the acronym "LIDB" is an abbreviation for Line Information Database (or Data Base).

[4] *See* Cincinnati Bell Telephone Co., CC Docket No. 323, 6 FCC Rcd 3501, 3501 n.2 (1991) (*Cincinnati Bell Final Order*).

[5] *See* Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Cards, Notice of Proposed Rulemaking, CC Docket No. 91-115, 6 FCC Rcd 3506, 3506 n.1 (1991) (*Cincinnati Bell Rulemaking*).

[6] *Id.* at 3507 n.4.

[7] *Southwestern Bell LIDB Order*, 6 FCC Rcd 6095.

[8] *Id.* at 6098.

[9] *See id.* at 6099-6100.

[10] *See* Cincinnati Bell Telephone Co., CC Docket No. 323, 6 FCC Rcd 3501 (1991) (*Cincinnati Bell Final Order*).

[11] *See* Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Notice of Proposed

B. Petition

6. On January 17, 1992, SNET filed a petition for waiver of Part 69 of the Commission's Rules, in which SNET seeks authority to establish the rate elements which Southwestern Bell was permitted to establish in the *Southwestern Bell LIDB Order*. No parties filed oppositions to SNET's petition for waiver.

C. Discussion

7. The petitioner requests waiver of Part 69 of the Commission's Rules to establish the same rate structure that the Bureau permitted Southwestern Bell to establish in the *Southwestern Bell LIDB Order*. As we discussed in the *Southwestern Bell LIDB Order*, a waiver of Part 69 is warranted because Part 69 does not currently provide for this service. Moreover, the costs that the LEC incurs to provide LIDB service should be recovered from the user or group of users whose service needs require the LEC to incur the costs. Therefore, the establishment of service-specific charges is a cost-causative method for recovering the costs of LIDB service.[13] Because these facilities are used on a dedicated basis, the Bureau agreed with Southwestern Bell that the charge for CCS interconnection service should be on a flat, per line basis.[14] Moreover, the Bureau found such charges to be consistent with the three goals for switched transport pricing established in the *Transport Rulemaking*.[15] The SNET waiver petition seeks authority to establish the rate structure approved in the *Southwestern Bell LIDB Order* and it is hereby granted.

III. TARIFF FILINGS

A. Transmittals

8. On December 13, 1991, SNET filed Transmittal No. 531 to introduce "Line Information Data Base (LIDB) service via SNET's Common Channel Signaling (CCS) network."[16] On January 14, 1992, SNET filed Transmittal No. 533 to amend Transmittal No. 531 to establish a rate structure that "mirrors the rate structure of Southwestern Bell's LIDB and CCSAS services."[17]

B. Pleadings

9. On December 30, 1991, MCI filed a petition to suspend and investigate Transmittal 531. SNET filed a reply on January 7, 1992. On January 21, 1992, MCI filed a petition to suspend and investigate Transmittal 533; SNET filed a reply on January 27, 1992.

10. MCI argues that the cost support for Transmittal No. 531 is insufficient and claims that the rates are unreasonably high.[18] Specifically, MCI charges that SNET has not provided any meaningful information pertaining to the Common Channel Signaling Cost Information System (CCSCIS) and SNET's internally developed Model for Incremental Cost and Revenue Analysis (MICRA).[19]

11. MCI also asserts that the terms and conditions in SNET's LIDB tariff are unreasonably vague.[20] MCI contends that if terms and conditions are not clearly spelled out, it is possible that two users might pay the same rate for a service but not receive identical service, thereby resulting in a violation of Section 202(a) of the Communications Act of 1934.[21] MCI further argues that SNET's interconnection specifications must be more specific, insisting that the referenced Bell Communications Research, Inc. (Bellcore) publications are not industry standards and are subject to revision.[22]

12. SNET replies that it developed its LIDB rates in compliance with the price cap rules and insists that its tariff satisfies all the tests applicable to a new price cap service offering.[23] SNET argues that it filed extensive cost support of its rates in compliance with the Commission's Rules as outlined in the *Part 69 ONA Order*.[24] SNET asserts that it is not appropriate for MCI to analyze SNET's CCSCIS and MICRA models as these models contain highly proprietary data related to SNET's network.[25]

13. SNET also contends that its tariff for LIDB service includes terms and conditions which adequately describe the service offering and protect against any unreasonable discrimination.[26] SNET claims that issues of network performance and congestion are clearly defined in the Bellcore technical specifications to which SNET refers in its tariff.[27] SNET argues that it maintains the performance of its network to ensure the accuracy of its data and to preserve fraud control measures.[28] Finally, SNET asserts that MCI provides no justification for its claim that the terms, conditions of service, and interconnection specifications must be addressed prior to the implementation of SNET's LIDB service.[29]

14. In its petition against Transmittal No. 533, MCI restates its objections to Transmittal No. 531, insisting that Transmittal No. 533 contains the same defects as Transmittal No. 531.[30] MCI also argues that SNET failed to address any of the issues set forth in its initial petition.[31]

Rulemaking, 6 FCC Rcd 3259 (1991) (*Expanded Interconnection Rulemaking*).

[12] MTS and WATS Market Structure, CC Docket No. 78-72 and Transport Rate Structure and Pricing, CC Docket No. 91-213, 6 FCC Rcd 6126 (1991) (*Transport Rulemaking*).

[13] *Southwestern Bell LIDB Order*, 6 FCC Rcd at 6099.

[14] *Id.*

[15] *Id.* at 6099-6100.

[16] SNET Transmittal No. 531 at 1.

[17] SNET Transmittal No. 533 at 1.

[18] MCI Petition (Tr. 531) at 4-8.

[19] *Id.* at 5-6.

[20] *Id.* at 8-10.

[21] *Id.* at 8-9.

[22] *Id.* at 10-11.

[23] SNET Reply (Tr. 531) at 1-2.

[24] *Id.* at 2-3 (*citing* Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and Order, Order on Further Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991) (*Part 69 ONA Order*)).

[25] *Id.* at 3.

[26] *Id.* at 4.

[27] *Id.*

[28] *Id.* at 5.

[29] *Id.*

[30] MCI Petition (Tr. 533) at 1-2.

[31] *Id.* at 2.

15. SNET replies that MCI merely repeats the claims included in its petition against Transmittal No. 531.[32] Consequently, SNET reiterates its responses to MCI's allegations, arguing that MCI raises no questions which would merit suspension and investigation of Transmittal No. 533.[33] SNET also insists that its initial reply addressed the issues raised by MCI, thereby establishing that MCI's petition raises no questions of unlawfulness which would merit suspension and investigation.[34]

C. Discussion

16. We conclude, based on our review of the transmittals and the associated pleadings, that these transmittals raise substantial questions of law and fact which require further investigation to determine whether the rate levels are excessive and whether the terms and conditions are reasonable. Therefore, because customers may be subject to excessive rates as a result of these transmittals, which may warrant refunds at the conclusion of this investigation, we will suspend the above-referenced transmittals for one day, impose an accounting order, and initiate an investigation. We will establish a pleading cycle and designate the specific issues to be examined in this investigation in a future Order.[35] CC Docket No. 92-24 has been assigned to this investigation and the investigation commenced in the *LEC LIDB Order*.

IV. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that the petition for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, filed by Southern New England Telephone Company IS GRANTED.

18. IT IS FURTHER ORDERED that, pursuant to Sections 204(a) and 403 of the Communications Act of 1934, 47 U.S.C. §§ 204(a), 403, an investigation IS INSTITUTED into the lawfulness of the tariff revisions filed by Southern New England Telephone Company, Tariff F.C.C. No. 39, Transmittal Nos. 531 and 533.

19. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the instant tariff revisions filed by Southern New England Telephone Company ARE SUSPENDED for one day.

20. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, Southern New England Telephone Company SHALL FILE tariff revisions reflecting this suspension no later than seven business days from the release of this Order. We hereby waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59, and grant Special Permission No. 92-89 for this purpose.

21. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, Southern New England Telephone Company SHALL KEEP ACCURATE ACCOUNT of all amounts received that are associated with the rates that are the subject of this investigation.

22. IT IS FURTHER ORDERED that the petitions for suspension and investigation of the instant transmittals, filed by MCI Telecommunications Corporation, ARE GRANTED to the extent indicated, and otherwise ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

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[32] SNET Reply (Tr. 5 at 2-4.
[33] *Id.* at 2.
[34] *Id.* at 3.
[35] We will investigate these transmittals as part of the investigation of other carriers LIDB tariffs that we established in the *LEC LIDB Order*. *See* note 2, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Commission Requirements
for Cost Support Material
To Be Filed with 1992 Annual
Access Tariffs

ORDER

Adopted: February 10, 1992; Released: February 10, 1992

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. This Order sets forth certain requirements for summary cost support material that local exchange carriers (LECs) must file to support their annual access charge tariff filings on or before April 2, 1992[1] in partial fulfillment of the requirements established in Sections 61.38 and 61.41 through 61.49 of the Commission's Rules.[2] Specific data formats are detailed in the Tariff Review Plan (TRP), and are appended to this Order.[3] The TRPs display basic cost, demand, and rate information in a manner that is consistent for all LECs, thereby aiding review by the Commission and interested parties of the LECs' required annual access tariff filings. The TRPs have served this purpose effectively in past years.

A. Background

2. The background concerning the development of previous TRPs can be found in our previous TRP Orders.[4] Based on our continued experience in reviewing the LECs' interstate access tariffs and in evaluating the usefulness of the TRP data provided by the LECs in previous filings, and based on various changes in the Commission's Rules and other changes,[5] it is necessary to modify last year's information requirements in certain respects. These modifications were developed after informal discussions with representatives of the LECs and other members of the industry and after comments on improvements and modifications to the 1991 TRP were requested from all interested parties.[6]

B. Price Cap Carriers

3. In the *LEC Price Cap Order*, the Commission adopted mandatory price cap regulation for the regional Bell Operating Companies (RBOCs)[7] and for GTE Telephone Operating Companies (GTOC). On November 1, 1990, these companies made their first price cap filings to be effective January 1, 1991, and United Telephone Companies (United) and Contel Corporation (Contel) also elected to file as price cap carriers. In the 1991 annual filing, made April 2, 1991, Southern New England Telephone Company (SNET) and Rochester Telephone Corporation (Rochester) also elected to file as price cap carriers. These carriers must make their 1992 annual access tariff filings under the price cap rules. Any other carrier that wishes to elect price cap regulation may do so as part of its 1992 annual filing. A carrier subject to price caps, or electing price caps in this filing, must file the price cap TRP outlined in Section II of this Order, below.

C. Rate of Return Carriers

4. Carriers, other than those previously subject to price cap regulation and those carriers that elect price caps at this time, remain subject to rate of return regulation. Carriers subject to rate of return regulation must file either the Tier 1 or Tier 2 TRP as outlined in Sections III and IV, respectively, of this Order.

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[1] *See* Access Tariff Filing Schedules, CC Docket No. 88-326, FCC 88-283, Report and Order, released Sept. 14, 1988 (*Tariff Filing Deferral Order*).

[2] 47 C.F.R. §§ 61.38 and 61.41 through 61.49. Compliance with the requirements set forth in this Order does not ensure acceptance of carriers' access charge tariffs or replace total support material requirements. Carriers remain obligated to provide adequate supporting documentation for their access charges. For instance, LECs should note additional cost support requirements outlined in Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the Commission's Rules), CC Docket No. 86-182, DA 88-809, released May 31, 1988, at paras. 3-4.

[3] The TRP formats are developed for the specific circumstances of the calendar year in which the tariffs will become effective. Thus, the TRPs discussed in this Order, which will accompany the April 2, 1992, access tariff filings scheduled to become effective on July 1, 1992, will be referred to as the 1992 TRPs.

[4] *See, e.g.*, Commission Requirements for Cost Support Material To Be Filed with 1991 Annual Access Tariffs, 6 FCC Rcd 1339 (1991) (*1991 TRP Order*).

[5] *See, e.g.*, Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the Commission's Rules), Order, CC Docket No. 86-182, 4 FCC Rcd 4239 (1989) (*ARMIS Order); Tariff Filing Deferral Order;* Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and Order, Order on Further Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991) (*Part 69 ONA Order), recon. pending.*

[6] *See* Common Carrier Bureau Solicits Comments Regarding Modifications and Improvements to the Tariff Review Plan, 6 FCC Rcd 7463 (1991) (*December 10 Public Notice*). Comments in response to our *December 10 Public Notice* were filed on December 30, 1991, by Ameritech Services (Ameritech), American Telephone and Telegraph Company (AT&T), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Corporation (BellSouth), NYNEX Telephone Companies (NYNEX), Rochester Telephone Corporation (Rochester), Southern New England Telephone (SNET), Southwestern Bell Telephone (Southwestern), United States Telephone Association (USTA), and US West Communications, Inc. (US West).

[7] The RBOCs are Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Corporation (BellSouth), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Pacific Bell and Nevada Bell (Pactel), Southwestern Bell Telephone Company (SWB), and US West Communications, Inc. (US West).

1. Definition of Tier 1 and Tier 2 Companies

5. As we have noted in previous TRP Orders, the LECs' ability to provide cost, demand, and revenue data varies depending on the size of the company.[8] In those Orders, we divided the LECs into two categories, Tier 1 operating companies and Tier 2 operating companies, and devised a different set of summary data requirements for each.

6. We are retaining, for carriers subject to rate of return regulation, the definitions of Tier 1 and Tier 2 companies used in the *1991 TRP Order*.[9] Thus, for this year's TRP, we will distinguish between Tier 1 and Tier 2 companies by applying the criterion that Sections 32.11(a) and 32.11(e) of the Commission's Rules use to distinguish Class A and Class B companies. Class A companies are those companies having annual revenues from regulated telecommunications operations of $100 million or more; Class B companies are those companies having annual revenues from regulated telecommunications operations of less than $100 million. The initial classification of a company is determined by its lowest annual operating revenues for the five immediately preceding years. Subsequent changes in classification are made when annual operating revenue shows a greater or lesser classification for five consecutive years. Tier 1 companies are those Class A companies which are not subject to price cap regulation by either Commission Order or election, and Tier 2 companies are those Class B companies which are not subject to price cap regulation by either Commission Order or election.

7. In the *1991 TRP Order*, we distinguished smaller Tier 2 LECs from the larger Tier 2 LECs by applying the definition of small telephone company study areas adopted in the *Small Telephone Company Order*.[10] We then adopted different TRPs and different test years for the larger Tier 2 companies and the small telephone companies. For purposes of this Order, small telephone companies are differentiated as in the *1991 TRP Order*. Thus, small telephone companies, denoted Tier 2B companies, are those Tier 2 companies which are in National Exchange Carrier Association (NECA) Subset 3 and which serve 50,000 or fewer access lines.[11] All other Tier 2 companies are Tier 2A. As before, only companies which file on a prospective basis and do not concur in the NECA traffic sensitive tariff are required to file TRPs.

2. Definition of Test Year and Past Year Cost of Service Period

8. The Commission's Rules require that carriers which are not subject to price cap regulation and are not small telephone companies must submit, in support of their proposed rate changes, a past year cost of service (PYCOS) study for the most recent 12-month period and a study projecting costs for a representative 12-month period (test year).[12] Those rules also require that access rates be targetted to earn the authorized rate of return.[13] In the present case, the rates filed to be effective July 1, 1992, will be expected to remain in effect through June 30, 1993. We are adopting the period July 1, 1992, through June 30, 1993, as the test year for Tier 1 and Tier 2A LECs. All ratemaking must be based upon test year projections, except for small telephone companies, as noted below. For the purpose of the 1992 annual access tariff filings, we also direct Tier 1 and Tier 2A LECs to submit data for the period January 1, 1991, through December 31, 1991, as PYCOS data. As we discuss below, NECA must also use this PYCOS and test period.

9. We are establishing optional cost support requirements for Tier 2B telephone companies. The *Small Telephone Company Order* allowed small telephone companies to file access tariffs for their traffic sensitive (TS) rates every other year, using the following optional cost support and ratemaking methods: (1) a company must compute rates, for the first access filing, based on a "cost of service study for all elements for the most recent 12-month period with related demand for the same period", and for subsequent access filings, based on a "cost of service study for all elements for the total period since the local exchange carrier's last filing, with related demand for the same period",[14] (2) cost support need not be submitted with the filing; and (3) the Commission may require a company to submit such support information.

10. For the 1992 annual access tariff filing, small telephone companies that have elected to file based on historic costs are not required to file. Small telephone companies that elect ot file TS rates based on historical cost of service studies for the first time should use data for January 1, 1991, through December 31, 1991, if available. Small telephone companies also have the option of adopting the test period and PYCOS period required of the larger telephone companies in this Order. Small telephone companies which elect to use a prospective test year for their 1992 annual access tariff filing must submit the cost support data required by this Order for Tier 2A companies.[15]

II. PRICE CAP TARIFF REVIEW PLAN

11. The 1991 annual access tariff filing was the first annual price cap filing. With some changes,[16] the price cap TRP used for the 1991 annual access tariff filing is being adopted for price cap LECs for this annual access tariff filing. In the following paragraphs, we discuss the

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[8] *See* Commission Requirements for Cost Support Material To Be Filed with Access Tariffs on March 1, 1985, Public Notice, Mimeo No. 2133, released Jan. 25, 1985 (*January 25 Public Notice*).

[9] *See 1991 TRP Order* at para. 6.

[10] Regulation of Small Telephone Companies, CC Docket No. 86-467, FCC 87-186, released June 29, 1987, recon. pending (*Small Telephone Company Order*). *See also* 47 C.F.R. §§ 61.39(a) and (b), 69.602.

[11] *See* 47 C.F.R. § 69.602 for a definition of the subsets that vote separately for NECA directors.

[12] *See* 47 C.F.R. § 61.38(b)(1).

[13] *See* 47 C.F.R. §§ 69.2(b) and (z).

[14] 47 C.F.R. §§ 61.39(b)(1)(i) and (ii).

[15] Some companies which, on their own, would qualify as Tier 2B companies are classified as Tier 2A companies because they are affiliated with companies that are NECA Subset 2 companies or that have study areas of greater than 50,000 access lines. Companies which would be Tier 2B companies but for such affiliation must use the July 1992 through June 1993 prospective test year and furnish PYCOS data for calendar 1991.

[16] For example, the 1992 annual access tariff filing is the first LEC price cap filing which reflects the computation of sharing and low end adjustment mechanism amounts.

purpose of, and changes to, the price cap TRP charts. Attachment A of this Order provides the charts for the price cap TRP.

12. In the 1991 annual access tariff filing, we required minutes of use and revenues to be reported in thousands, rather than units. For some companies, this caused indexes computed from information on the TRP to differ from the more accurate indexes reported by the companies. To correct this, we require that all data except rates be reported in units. Individual rates must be reported to the number of decimal places reflected in the company's tariffs.[17]

A. Chart IND

13. This summary chart is a slightly modified version of chart SUM-1 in the 1991 TRP. It displays the existing Price Cap Indexes (PCIs), Actual Price Indexes (APIs), Service Band Indexes (SBIs), the DS1 and DS3 subindexes, and the new upper and lower bands on the SBIs and subindexes. It deletes the requirement in the 1991 TRP to report the cap and the actual rate of the carrier common line (CCL) rate, which will be reported on a separate chart for this filing.

B. Chart CCL

14. This is a new chart which details the computation needed to derive the new cap on the CCL rate. It displays base period CCL and Subscriber Line Charge (SLC) demand and rates and computes the new cap on CCL rates according to the formula in Section 61.46(d). This chart replaces the display of the CCL cap and rates which was on Chart IND in the 1991 TRP. This level of detail is necessary in order to allow us to verify the correctness of the computation of the CCL cap.

C. Chart PCI

15. This chart provides the data needed to compute, and the computation of, the PCI for the four baskets. It displays, by basket, the following variables: (1) GNP-PI, the Gross National Product Price Index, the measure of inflation; (2) X, the productivity factor;[18] (3) Y, the access expense at the last update of the PCI;[19] (4) the change in access expense; (5) the change in exogenous costs; (6) R, base period revenue;[20] (7) w, the weighting factor used in computing the PCI; and (8) g, the growth in minutes per line.[21]

16. Several LECs suggested in their comments that this chart should be modified to include a hypothetical PCI, which would be computed without the sharing/low end adjustment amounts, for use in next year's annual access filing, when those sharing amounts will be removed.[22] We do not believe that this hypothetical PCI is necessary for us to evaluate this year's access filings, and are therefore not requiring its inclusion in this year's TRP. LECs may, if they wish, include the computation of this hypothetical PCI in the workpapers included in their filings.

D. Chart SUM

17. This chart provides base period (calendar 1991) demand multiplied by current rates and proposed rates, and the difference between the two, for each basket and service category. It is a slightly modified version of chart SUM-1 in the 1991 TRP.

E. Chart EXG

18. This chart provides supporting data for computation of the exogenous change amounts used to compute the PCIs. It displays, by basket, cost data on exogenous changes for the Subscriber Plant Factor (SPF) and Dial Equipment Minutes (DEM) transitions, long term and transitional support, inside wire amortizations, reserve deficiency amortizations, and excess deferred taxes. This year, we have also added separate columns for investment tax credit amortizations and the sharing or low end adjustment amounts based on earnings in calendar 1991.

19. Carriers which were subject to price caps from January 1, 1991 must base their sharing or low end adjustment amounts on earnings for calendar 1991. The level of sharing or the low end adjustment amount for the second half of 1991 shall be computed based on the productivity factor chosen in the 1991 annual filing, and the amount for the first half of 1991 shall be computed assuming that the productivity factor in that period was 3.3 percent (3.0 percent in the Interexchange basket). For carriers which elected price caps on July 1, 1991, the sharing or low end adjustment amounts must be computed based on earnings for the period July 1, 1991, through December 31, 1991, and the earnings level at which the sharing or low end adjustments occur must be based on the productivity factor elected in the 1991 annual filing.

20. Carriers must submit their Form 492 for calendar 1991 as part of their cost support. In addition, carriers must provide full documentation in their workpapers of their computations of the sharing amount and of the method used to allocate the sharing amounts among the baskets. Carriers shall remove the earnings of excluded services by assuming that these services earned the same rate of return as the total interstate services.

21. In the 1991 annual access filing, the Bureau had to request additional data after the tariffs were filed to assist us in examining the exogenous changes for Reserve Defi-

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[17] In certain cases, the rates reported on chart RTE-1 may be aggregate rates, *i.e.*, an average of several rates. In those cases, rates should be displayed to six decimal places.

[18] This must have the value 3.3 percent in the Common Line (CL), Traffic Sensitive-Switched (TS), and Special Access (SpAc) baskets, and 3.0 percent in the Interexchange (IX) basket, or, at the companies' option, 1 percentage point higher in each of these baskets. Choice of the higher productivity factor will affect the levels at which sharing and the stabilizer occur in the 1993 annual filing.

[19] *See* 47 C.F.R. § 61.44(b).

[20] *Id.*

[21] *See* 47 C.F.R. § 61.45(c). Companies must also provide in the workpapers accompanying their filings the detailed data used to compute g, *i.e.*, both carrier common line minutes of use and subscriber lines for 1990 and 1991. This data for 1990 should match the data filed in the chart RTE-1 of the 1991 TRP, and the numbers for 1991 should match the data filed in chart RTE-1 of the 1992 TRP.

[22] *See, e.g.*, Ameritech Comments at 2, Rochester Comments at 1-2.

ciency Amortizations (RDA), Inside Wire Amortizations (ISW), Excess Deferred Taxes (EDT), and Investment Tax Credit Amortizations (ITC). This year, we require that companies include this additional data in their workpapers. For both ISW and RDA, this data must provide, by state and by tariff entity, the expenses in the July 1, 1991 through June 30, 1992 tariff year and the July 1, 1992 through June 30, 1993 tariff year, the expense difference between those two years, the percent of the expenses allocated to each of the four baskets, and the total expenses allocated to each of the four baskets. For both EDT and ITC, companies must provide, by tariff entity, the total company and interstate amounts for calendar 1991 and the July 1, 1992 through June 30, 1993 tariff year.

F. Chart RTE

22. This chart displays aggregate data which can be used to compute the APIs, SBIs, and sub-indexes. As in last year's TRP, this chart displays base period (calendar year 1991) demand, current rates, proposed rates, and revenues computed by multiplying base period demand by current and by proposed rates. This year, we have added columns for the display of rates at the last update of the PCI and revenue computed by multiplying base period demand by these rates. This will enable us to verify the accuracy of the computation of R and thus of the PCIs. The chart also displays the APIs, SBIs, and subindexes. The data reported on this chart is not at the rate element level of detail.[23] The aggregate format or the chart RTE is necessary to allow rapid, consistent verification of the computation of the indexes across all companies.

23. Chart RTE-1 requires modification to include Open Network Architecture (ONA) rates that became effective in the Ameritech region in 1991. These rates will be included in the Basket 2 API and the Local Switching SBI. Two sets of rows have been added to reflect the ONA elements. The first set is composed of three rows which report the three Basic Service Arrangement (BSA) rate elements and one row which reports all the Basic Service Elements (BSE) elements. These rows should be populated with data for any historical ONA demand in 1991.

24. The second set of rows also contains three rows for the BSA rate elements and one row for all the BSE elements. These rows should be populated with the recast historical feature group (FG) demand. Because only Ameritech's ONA rates went into effect in 1991, only Ameritech must populate these two sets of rows; other carriers should enter zeros in these rows for all columns which require entries.

25. The *Part 69 ONA Order* noted that the bundled feature groups disappear at the time of the annual access filing in which the unbundled BSA and BSE rate elements are placed under caps, and required that carriers include as base period demand for the BSAs and BSEs both the historical demand for these two rate categories and the demand for the bundled FGs, recast into BSAs and BSEs.[24] To aid the Bureau in assessing Ameritech's recasting of its historical FG demand, Ameritech must display its historical FG demand, its historical BSA and BSE demand, if any, and its recast historical FG demand in the appropriate rows on this chart. Ameritech shall also enter rates times demand in the appropriate columns of this chart for each of these rows. In the rows which sum total local switching rates times demand and total traffic sensitive rates times demand, Ameritech shall include only the relevant rates times demand.[25]

26. In the 1991 annual access tariff filing, we required price cap LECs to provide a chart in addition to RTE-1 which gave complete rate element detail, *i.e.*, demand, existing rates, and proposed rates, along with API, SBI, and sub-index computations, for every rate element. This chart was provided in both computerized and hard copy format. This rate element level of detail proved helpful in our review of the filings in certain cases in which the companies' computed indexes did not exactly match the indexes which could be computed from the aggregate data. We require this chart again this year, but only in computerized format.

27. In the 1991 annual access tariff filing, we did not specify the exact format for these charts, because each price cap LEC has a different number of rate elements. For effective analysis, however, we believe it is necessary this year to require that all LECs use the same column headings. Specifically, for each rate element, LECs shall display the rate element name, an identifying code if desired, base period demand, current rates, and filed rates. The different number of rate elements which the LECs continue to use prevents us from specifying the rows, but each row of this chart should report one rate element. The rows should also reflect the same basket and service category sequence which is used in chart RTE-1.

28. In addition to the requirements specified above, price cap carriers must include with their support materials a list of all currently applicable Part 69 waivers that result in rate elements different from those specified in Part 69 of the Commission's Rules. The list shall be composed of the following information: (1) a citation to the Commission or Bureau Order granting the waiver; (2) a brief description of the waiver, including whether any new rate elements were created; and (3) the basket and, if applicable, the service category treatment of any rate elements created by the waiver. Price cap carriers must also include with their support materials a separate list of new services that are being incorporated into the actual price indexes for the first time. This list should contain all services which were introduced as new services under the price cap rules during calendar 1991. To assist us in verifying carrier compliance with the basket and service category structure established in the *LEC Price Cap Order*, carriers must also display, for each new service listed, the basket and service category to which the new service is assigned.

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[23] Rather, the data is provided for the main rate elements, and at an aggregated level for other rate elements.

[24] *See Part 69 ONA Order* at para. 48, n.84.

[25] Thus, for example, proposed rates times demand should include the proposed ONA rates times the sum of the historical ONA demand and the recast historical FG demand. Current rates times demand should include the ONA rates times historical ONA demand and the historical FG demand times current rates, but should exclude the recast historical FG demand times rates. The column which reports rates at the last PCI update times demand will report for the rate elements which were in effect at that time.

III. TIER 1 TARIFF REVIEW PLAN

29. The Tier 1 TRP requirements have evolved over time, based on the experience of the Commission and interested parties in using the TRPs to evaluate the annual filings and of the LECs in preparing them. In most ways, the 1992 Tier 1 TRP charts are similar to those in the 1991 TRP. Based in part on the suggestions contained in the responses to the *December 10 Public Notice*, certain changes have been made to the Tier 1 TRP. These changes involve elimination of unneeded or obsolete requirements and the addition of requirements that will improve the Commission's ability to evaluate the rates. These new requirements have been framed to place the smallest possible burden on the LECs, while allowing us to evaluate the rates filed by the carriers. In the following paragraphs, we discuss the most important changes in TRP requirements. Attachment B of this Order provides the charts for the Tier 1 TRP.

A. Cost Charts (COS)

30. The 1991 TRP incorporated historical data filed in ARMIS reports, and used the format of these ARMIS reports for reporting prospective data. The automated system of reports adopted under ARMIS consists of four reports: the Quarterly Report (Report 43-01),[26] which provides aggregate quarterly financial data reflecting the results of accounting and cost allocation requirements prescribed in Parts 32, 64, 36, and 69; the USOA Report (Report 43-02),[27] which shows annual data for every account prescribed in Part 32, the Uniform System of Accounts; the Joint Cost Report (Report 43-03),[28] which shows allocations of annual costs between regulated and non-regulated activities as required by Part 64; and the Access Report (Report 43-04),[29] which shows the annual results of the jurisdictional separations and access charge rules as prescribed in Parts 36 and 69, respectively. These four ARMIS reports are filed in mechanized and printed form.

31. The data required by these charts has proved valuable in our analysis of the rates filed in recent annual access tariff filings. Provision of this data allowed us to avoid burdensome and time-consuming investigations that were necessary in earlier annual access tariff filings.

32. The historical data required by the April 1, 1992, ARMIS filings in Charts 43-01, 43-03 and 43-04 reflects the same time period (calendar year 1991) as that adopted in this Order for use as the PYCOS period for the 1992 annual access tariff filings. Since this data provides adequate historical financial information concerning the LECs' operations during the PYCOS period, in order to reduce the LECs' reporting burdens, we will use information that the LECs provide in compliance with the April 2, 1992, ARMIS filing requirement for Charts 43-01, 43-03, and 43-04 for Charts COS-1(H), COS-6(H), and COS-7(H) in the 1992 TRP. Further, we are adopting the formats of ARMIS Charts 43-01, 43-03, and 43-04 for the provision of detailed prospective (test year) cost data in Charts COS-1(P), COS-6(P), and COS-7(P).

33. A chart by chart summary description of the TRP charts, including the most important modifications of the 1992 TRP is as follows:

(1) Chart COS-1: This chart is a prospective version of ARMIS Report 43-01. Historical data in the same format is provided by ARMIS Report 43-01.

(2) Chart COS-2: This chart provides total company and interstate time series cost data. As in the 1991 TRP, we need to obtain actual and forecast data in which inside wire and settlements expenses are treated consistently, and therefore are requiring the companies to file data which, as in the 1991 TRP, excludes these expenses for both historical and prospective time periods. Companies should exclude all expenses, both regulated and non-regulated, associated with inside wire, including maintenance, depreciation, and amortization. Companies should also exclude those settlement expenses which are access expenses (Account 6540) paid to another company.

(3) Chart COS-3: This chart displays the impacts of major rule changes and other changes. Various items for which estimates of cost impacts are required have been updated.

(4) Chart COS-4: This chart is the "report card" for the 1989, 1990, and 1991 test years. Forecasts and actuals for the 1989 and 1990 test years are required. The forecasts and actuals for the 1988 test year reported on this chart in last year's TRP are deleted, and the forecasts for July 1, 1991 through June 30, 1992, (the 1991 test year), and for July 1, 1992 through June 30, 1993 (the 1992 test year) are added. In addition, companies must report actuals for July 1991 through December 1991 and for calendar 1991 data. The data on this chart is used to assess the accuracy of the companies' forecasts.

On this chart in the 1989 annual access tariff filing, certain companies reported their forecasts on one basis, but their actuals on another.[30] Such inconsistent treatment renders direct comparison of forecasts and actuals impossible. The forecasts reported on this chart must be those reported in previous TRPs. Companies must ensure that the actuals reported for each period on this chart are on the same basis and include the same accounts as the forecast for that period. Consistent with our policy in each year since the *1989 TRP Order*, we will not credit "report card" data which indicates a company has grossly under-forecast its actuals, because we will

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[26] The format for this Report was adopted in Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), Order, CC Docket No. 86-182, 4 FCC Rcd 973 (1989).

[27] The format for this Report was adopted in Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), Order, CC Docket No. 86-182, 4 FCC Rcd 906 (1989); Errata, CC Docket No. 86-182, 4 FCC Rcd 1815 (1989).

[28] The format for this Report was adopted in Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), Order, CC Docket No. 86-182, 4 FCC Rcd 1040 (1989); Errata, CC Docket No. 86-182, 4 FCC Rcd 1815 (1989).

[29] The format for this Report was adopted in Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), Order, CC Docket No. 86-182, 4 FCC Rcd 4239 (1989).

[30] For instance, settlements were included in actuals, but not in forecasts.

presume that the actuals are not on the same basis as the forecasts (contrary to the instructions for this chart), unless the company fully explains the reason for the under-forecast.

(5) Chart COS-5: This chart provides data on equal access, and is unchanged, except for updating the time periods.

(6) Chart COS-6: This chart is a prospective version of ARMIS Report 43-03. Historical data in the same format is provided by ARMIS Report 43-03. We continue to find this chart useful in evaluating the split between regulated and non-regulated expenses. We are therefore requiring that this prospective chart be filed.

(7) Chart COS-7: This chart is a prospective version of ARMIS Report 43-04. Historical data in the same format is provided by ARMIS Report 43-04. This chart is useful in evaluating growth in cost accounts. USTA argues this chart is unnecessary because the data was used only in the cross sectional analysis we performed when all carriers were under rate of return regulation. We continue to believe that the data on this chart will be useful in identifying sources of increased costs in comparison to historical costs. Therefore, we require that the companies file this prospective chart.

B. Depreciation Chart (DEP)

(1) Chart DEP-1: Chart DEP is unchanged from the 1991 TRP, except that the PYCOS period and test year are updated. Only those Tier 1 companies whose depreciation rates are prescribed by the Commission are required to file the DEP-1 chart.

C. Demand Charts (DMD)

34. The 1992 TRP eliminates certain Chart DMD requirements contained in the 1991 TRP in accordance with commenters' suggestions and our experience with the 1991 TRP. Specifically, for the reasons discussed below, it eliminates all data prior to January 1989 for Chart DMD-1, prior to 1990 for Chart DMD-2, and prior to 1989 for Chart DMD-5.

(1) Chart DMD-1: This chart reports time series of Common Line (CL) and Traffic Sensitive (TS) minute of use (MOU) data. Data provided on this chart in previous annual access tariff filings is subject to revision for out-of-period adjustments for two years. In the 1991 TRP, companies reported data on this chart through December 1990. Therefore, only data from January 1989 forward must be provided again this year to ensure the data reflects all out-of-period adjustments.

(2) Chart DMD-2: This chart displays quarterly access line data. Chart DMD-2 is unchanged from the 1991 TRP except for the elimination of the requirement to file pre-1990 data. Data for the periods prior to 1990 was filed in the 1991 TRP and it is our understanding that the data is not subject to revision.

(3) Chart DMD-3: This chart is the "report card" for the 1989, 1990, and 1991 test years. Forecasts and actuals for the 1989 and 1990 test years are required. The forecasts and actuals for the 1988 test year reported on this chart in last year's TRP are deleted, and the forecasts for July 1, 1991 through June 30, 1992, (the 1991 test year), and for July 1, 1992 through June 30, 1993 (the 1992 test year) are added. In addition, companies must report actuals for July 1991 through December 1991 and for calendar 1991 data. The data on this chart is used to assess the accuracy of the companies' forecasts.

(4) Chart DMD-4: Chart DMD-4 requires the provision of special access demand data. Historical special access demand for channel terminations, interoffice mileage, and circuits is provided on a monthly basis (end-of-period) beginning with January 1989 for the total industry. As in the 1991 TRP, each LEC must provide a definition of services included in wideband.

(5) Chart DMD-5: This chart provides detailed demand and revenue data for common line, and is unchanged from the 1991 TRP except for elimination of the requirement to file pre-1989 data. Data for periods prior to 1989 is not subject to revision, has been provided in previous TRPs, and need not be submitted again this year.

D. Chart RTE

35. The RTE charts require the provision of (1) rate comparisons; and (2) revenue comparisons ("price-outs") under different rate assumptions. These charts permit the calculation of percentage changes in rates for entire rate categories. Comparisons should be made at the tariff level at which current rates are filed, not the tariff level at which 1992-93 rates are filed. Chart RTE-4 from the 1991 TRP, on which companies listed the companies with which they had pooled or averaged rates, is deleted. No company which remains under rate of return regulation reported any pooled or averaged rates in the 1991 TRP, so this chart appears to be unnecessary.

(1) Chart RTE-1: This chart displays end user and switched access rates. The chart is unchanged from the 1991 TRP except for the dates for which rates are displayed.

(2) Chart RTE-2: This chart displays selected special access rates. The chart is unchanged from the 1991 TRP except for the dates for which rates are displayed.

(3) Chart RTE-3: Chart RTE-3 displays access price-out comparisons, and is updated to reflect current rates, proposed rates, and rates in effect on July 1, 1991. Using projected test year demand and proposed rates versus rates in effect in 1991, revenues and revenue comparisons are calculated for End User, Carrier Common Line, Switching, Local Transport, Information, Equal Access, and Special Access. Nonrecurring charges should also be included in all price-outs.

E. Chart ERN

36. This chart displays historical and projected rates of return for the access service categories. This chart shows earnings at the current level of aggregation.

F. Chart REV

37. These charts display revenue and revenue requirement. They are unchanged, except for updating the test year period.

(1) REV-1: This chart displays rate-making demand, rates, computed revenue, and revenue requirement for the test year. This data is provided for several rate elements within the access service categories.

(2) REV-2: This chart displays, by access service category, recurring and non-recurring revenue. It also displays individual case basis (ICB) revenues.

G. Chart SEP

38. This chart lists, by Part 69 elements and sub-elements, the change in the test year revenue requirement due to the introduction of new basic studies which LECs plan to implement in the test year. Basic studies are used by the LECs to develop separations factors to allocate costs to the state and interstate jurisdictions. To the extent LECs introduce these new basic studies in the prospective period, their forecast costs may not be directly comparable to their historical costs. Therefore, provision of this data in a uniform and mechanized format will enable us to evaluate changes in costs between prospective and PYCOS periods. We are retaining this chart unchanged from the 1991 TRP, except for the time period reported.

H. Miscellaneous

39. We are retaining our requirements for the reporting of settlement revenue from shared facilities in the TRPs. As in the 1991 TRP, the demand and revenue requirement, on both a prospective and historical basis, must be included in the data provided by the company filing the tariff for the shared facility, and excluded from the data submitted by the company that does not file a tariff for the facility.

40. We also require Tier 1 companies to include in their cost support the amount of Account 6620 which is assigned to the Other Billing and Collecting expense category for the total company, interstate jurisdiction, and Common Line rate element. This data will allow us to assess the assignment of these costs to interstate access.

IV. TIER 2 TARIFF REVIEW PLAN

41. In this section we outline the requirements for Tier 2 companies. Attachment C of this Order provides the charts for the Tier 2 TRP. Based in part on the suggestions contained in the responses to the *December 10 Public Notice*, certain changes have been made to the Tier 2 TRP. These requirements have been adopted with a view toward minimizing the filing burdens of smaller companies and giving due weight to the concerns these companies have expressed regarding their ability to comply with the TRP data filing requirements.

42. As in the 1991 TRP, we believe that a single TRP for both the Tier 2A and the Tier 2B companies will not be burdensome. Having only one version of the Tier 2 TRP will also simplify our analysis of the annual access tariff filings. Therefore, we are adopting one TRP for both the Tier 2A companies and those Tier 2B companies which choose to file using a prospective test year. The requirements for those Tier 2B companies which choose to use an historical test year are given in Section I.C.2, *supra*.

43. Chart T2COS-1, both historical and prospective, is an update of T2COS-1 from the 1991 Tier 2 TRP. We request that all Tier 2 companies which file prospectively also file Charts COS-6 and COS-7 in the Tier 1 TRP, although in order to minimize their reporting burden we do not require them to do so.[31] This information will enable us better to evaluate any changes in a company's costs identified in the TRP. It is our understanding that no Tier 2 company has depreciation rates set by the Commission, and thus no chart equivalent to the Chart DEP in the Tier 1 TRP is required in the Tier 2 TRP. Charts T2DMD-1, T2DMD-2, and T2DMD-3 are updates of the 1991 Tier 2 Charts T2DMD-1, T2DMD-2, and T2DMD-3. As in the 1991 annual access tariff filing, the DMD charts for Tier 2 companies reflect billed rather than normalized demand. The Charts RTE, ERN, and REV are essentially the same as in the Tier 1 TRP. Similarly, "report cards" for cost and demand forecasting, Charts COS-2 and DMD-4 in Attachment C, are required.

V. GUIDELINES AND REQUIREMENTS APPLICABLE TO NECA

44. We do not detail specific summary data requirements for NECA in this Order. The level of detail contained in the Tier 1 plans should provide guidance to NECA in formulating the summary data for the common line pool that it should include in its filing.

45. For calculation of NECA's common line pool revenue requirement and demand, and the resulting long term support payment, and for NECA's traffic sensitive rates, NECA must rely on the estimates for hundreds of small companies. For those companies, it would be difficult to provide the detail required by the Tier 1 TRPs. Therefore, we refrain from requiring that NECA provide Tier 1 summary data for these calculations. The level of detail required by the Tier 2 plan should provide guidance to NECA in formulating the summary data that it should include as support for these calculations. The fact that we refrain from requiring specific summary data from NECA for its rates and payment amounts does not exempt NECA from providing support data in compliance with Section 61.38 of the Commission's Rules.

46. We do, however, require NECA to provide Chart ERN for the historical and prospective periods. Also, in its Chart COS-1, NECA will need to include a line for settlements from its average schedule companies, as it did in 1990 and 1991. We also require that NECA provide detailed cost support data concerning long term and transitional support calculations.

[31] Tier 2 companies which file on a prospective basis must also include in their cost support the Other Billing and Collecting expense data outlined in para. 40, *supra*.

VI. GENERAL INSTRUCTIONS

47. The following general instructions apply to Tier 1 LECs and Tier 2 LECs, and, except as noted, to price cap LECs. Except for Section VI.C, *infra*, the following general instructions also apply to NECA.

A. Errata

48. As we have noted in the past, the submission of incorrect cost support data and the subsequent filing of errata seriously detract from the ability of the Commission and interested parties to evaluate the rates within the notice period.[32] In previous TRP Orders, we required that any erratum be accompanied by a request for special permission to permit the transmittal to take effect on the originally scheduled effective date. Further, we required that, if such a request were refused, rates supported by the erratum must be refiled upon adequate notice, regardless of whether these rates differ from the rates as originally filed. We continue to believe that the special permission requirement is a reasonable means of encouraging improvement in the quality of data submitted in the annual access filings. We also believe it facilitates the tariff review process.

49. We therefore continue to require that carriers file a request for special permission with any erratum that is filed to correct errors or otherwise revise their access tariff support data. If such a request is refused, the carrier must refile the rates that are supported by the erratum, regardless of whether these rates differ from the rates as originally filed. These requirements pertain to all data filed in support of access charges, including all data that is required by the TRP. All TRP data must be filed no later than April 2, 1992, and must be accurate and complete.

50. In previous annual access tariff filings, a significant number of errata filings were submitted. For the 1992 annual access tariff filing, we may specify an early cut-off date for errata if it appears this will again occur. Carriers who discover errors after the cut-off will then be required to refile their tariffs with a later effective date. We also remind carriers, however, that they are under a legal obligation to correct any erroneous data discovered in the TRP or other cost support data.

B. Certification

51. NECA and the LECs must certify the accuracy of historical and test year data that is submitted in support of rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of revised rates, including all data that is required by the TRP. The text of the certification is the same as that adopted in the *1987 Waiver Order*[33] and the *1988 TRP Order*. The certification should be displayed as the last page in the binder containing each company's TRP.

C. Geographic Aggregation

52. Except for Charts RTE and ERN for rate of return carriers, all information required by the TRP must be displayed on the level of geographic aggregation to which the particular LEC's filed rates pertain. Charts RTE and ERN for rate of return carriers must pertain to the current level of aggregation. In addition, if the tariff rates are based on data from a number of study areas or operating companies, levels of aggregation associated with each study area (state) and operating company should be provided by Tier 1 and Tier 2 carriers (except for Charts RTE, ERN, and REV). Price cap carriers need not provide TRP data below the level of geographic aggregation to which their proposed rates pertain. Carriers need not aggregate the data above the tariff filing level.

D. Assistance from USTA

53. In order that the Commission and interested parties may evaluate the national impact of revised rates, we request that the USTA Data Reporting Work Group provide an aggregation of all price cap LEC data (except for those charts and portions of charts for which aggregation is inappropriate) in both hard copy and disk format.[34]

E. Waivers

54. If carriers find that they are unable to provide data required by the TRP, they may file applications for waiver. These waiver applications must demonstrate good cause for reporting a different or lower level of detail and must indicate how these deficiencies will be corrected. Carriers are strongly encouraged to comply with the requirements. Omission of individual data items or entries, without request for waiver, is unacceptable. If a carrier determines, however, that it will be unable to meet these requirements, it must file an application for waiver with the Commission no later than February 20, 1992. Oppositions to applications for waiver shall be filed not later than February 27, 1992. Each carrier requesting any waiver of the requirements of this Order or of any other Commission Rule or Order applicable to the 1992 annual access tariff filings shall include all such requests in this single application. Carriers should not delay undertaking development of data required by the 1992 TRP in anticipation that waiver requests will be granted.

55. In previous annual access tariff filings, commenters have requested that carriers be allowed to file data under proprietary protection. As in previous years, we are not persuaded that any data required by the 1992 TRP, including associated 1991 ARMIS data, requires proprietary protection.

F. Technical Requirements

56. Price cap LECs, as well as Tier 1 and Tier 2A companies, and those Tier 2B companies which file using a prospective test year, are required to file their TRPs in computerized form. As was the case in the 1991 annual access filing, it is our understanding from discussions with industry representatives that all Tier 2 companies can now provide the data in mechanized format. Therefore, all companies which file a TRP must provide the data in computerized form.

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[32] *See, e.g., 1991 TRP Order* at para. 41.

[33] *See* Annual 1987 Acess Tariff Filings, Petitions for Waivers of Filing Requirements, Memorandum Opinion and Order, Mimeo No. 6945, released Sept. 16, 1986 (*1987 Waiver Order*).

[34] Only Charts IND, SUM, and RTE need be summed. The portions of chart RTE which report rates and indexes, of course, need not be summed.

57. The Tier 1 historical versions of Charts COS-6 and COS-7 need not be provided in computerized form, since those versions will have been filed on April 2, 1992, as part of the companies' ARMIS reports. The prospective versions of these charts, however, must be filed in computerized form with the TRP. "Hard copy" printed versions of both the historical and prospective versions of Charts COS-1, COS-6, and COS-7 must be included in the TRP and should be aggregated to the tariff entity level.

G. Compliance with the Paperwork Reduction Act

58. In compliance with the Paperwork Reduction Act, we estimate burden-hours and place the Office of Management and Budget form number and date on the formats included with this Order. We also note that this TRP was developed after informal discussions with LECs and other industry representatives and after evaluation of comments filed in response to our *December 10 Public Notice*. By adoption of this Order, we are minimizing the burden on the LECs by several means. This Order deletes obsolete requirements and other requirements which have not proved useful. We note, especially, that we do not require the filing of some historical data which has been filed in previous years, and that we have eliminated chart RTE-4 for the Tier 1 rate of return carriers. These changes will lessen the burden compared to the 1991 annual access filings. We continue to rely on data filed in ARMIS for much of the historical cost data, and are requiring that prospective cost data be filed in a format patterned after the ARMIS filing. We continue to require significantly less data from the smaller LECs, thereby minimizing the burden of TRP data requirements for many Tier 2 companies.

VII. CONCLUSION; PROCEDURAL REQUIREMENTS

59. This Order will be sent directly to all carriers that will file their own access tariffs on April 2, 1992, and a copy will also be sent to NECA. A copy of the Order and all attachments will be available for inspection at the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. The Commission will publish the text of this Order in the FCC Record. Those parties wishing to obtain copies of Attachments A, B, and C can do so through the Commission's contractor for public records duplication.

60. Each company should submit its TRP separately from other portions of its tariff filing. Each TRP should be filed in a separate Volume 1-2 accompanying Volume 1 of the Description and Justification. Each TRP should be arranged by study area rather than by chart. Each company should provide an extra copy of the TRP to the Accounting and Audits Division, Suite 812, 2000 L Street, N.W., Washington, D.C. 20036 on or before April 2, 1992. The Commission will provide further details regarding the procedures applicable to the April 2 tariff filing in a future release.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Telephone Companies Tariff F.C.C. No. 1 — Transmittal No. 473

MEMORANDUM OPINION AND ORDER

Adopted: February 10, 1992; Released: February 10, 1992

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. By Transmittal 473, Bell Atlantic Telephone Companies (Bell Atlantic) flows through to its ratepayers the effects of state tax increases passed by the Pennsylvania General Assembly on August 4, 1991. The tax increases are retroactive to January 1, 1991. Tr. 473 Description and Justification (D&J) at Section 1.1. According to Bell Atlantic, of the taxes recently imposed, the following directly impact Bell Telephone Company of Pennsylvania (BPA): the Corporate Net Income Tax, the Capital Stock/Franchise Tax, and the Public Utility Realty Tax. Bell Atlantic states that these tax increases were not reflected in its base period costs or price cap indices, and treats most of the additional costs resulting from the tax increases as exogenous.[1] *Id.* at Section 1.2 and p. 1-3.

2. Because the tax changes are retroactive to January 1, 1991, two separate tariff periods are affected -- January 1, 1991 through June 30, 1991, and July 1, 1991 through June 30, 1992. Bell Atlantic argues that the entire tax liability for the first period should be treated as exogenous because the first annual calculation of the price cap index, effective July 1, had not yet occurred, and therefore the price cap index -- and rates -- did not reflect cost changes measured by the inflation less productivity component of the price cap index. *Id.* at p. 1-5. With respect to the current tariff period, July 1, 1991 through June 30, 1992, Bell Atlantic "identified" $7.3 billion in tax increases across the country which "could have" influenced the current 1990 inflation measure, the Gross National Product Price Index (GNP-PI), calculated the direct benefit of those taxes in the GNP-PI, and then used that amount to reduce the exogenous cost change used in its index calculations. *Id.* at pp. 1-5 - 1-6. Bell Atlantic plans to recover a portion of its increased tax liability, retroactive to January 1, 1992, over the remaining six months of the current tariff period -- January 1, 1992 through June 30, 1992. *Id.* at 1-6. For the reasons discussed below, the Bureau rejects Transmittal 473.

II. PLEADINGS

3. US Sprint Communications Company Limited Partnership (Sprint) has filed a petition to reject, or alternatively, suspend and investigate Transmittal 473, arguing in general that the tax changes at issue are endogenous and Bell Atlantic's method of recovery constitutes impermissible retroactive ratemaking. Sprint Petition at 2. Sprint also contends that the impact of these tax increases should be captured in the GNP-PI used in the next annual price cap filing in keeping with Sections 61.44(b) and 61.45(c) of the Commission's Rules. *Id.* at 3 and n.2. Sprint further argues that Bell Atlantic has failed to meet its burden of proof in requesting exogenous treatment for the tax increases at issue because it has failed to show that its rate increases will not double count the tax law increase, or that the Pennsylvania tax law change will "uniquely or disproportionately" affect Bell Atlantic. *Id.* at 3.

4. Finally, Sprint alleges that by attempting to recover for the retroactive tax increase, Bell Atlantic is engaged in retroactive ratemaking, *i.e.*, increasing its future rates to recover costs incurred in a past period. *Id.* at 4. Sprint argues that this violates a cardinal principle of ratemaking set forth in *Nader v. FCC*,[2] and should be prohibited under price cap regulation. *Id.*

5. MCI Telecommunications Corporation (MCI) has filed a petition to reject, or alternatively suspend and investigate Transmittal 473 also alleging that Bell Atlantic failed to demonstrate that the impact of the tax increase is not already accounted for in the GNP-PI. MCI asserts that Bell Atlantic's methodology fails to determine systematically the amount of tax increases which are included in the GNP-PI. MCI suggests that a carrier should have to show a "fundamental failure" of the GNP-PI to capture a change in tax laws which "unequivocally imposes a unique and onerous burden on the LEC" before the Commission should grant exogenous treatment for taxes. According to MCI, an in-depth, careful evaluation of the composition of the GNP-PI, and a comprehensive analysis of the nature of tax law changes in the United States as a whole should be performed. MCI Petition at 6. Without such an evaluation, MCI contends, it is impossible for a local exchange carrier (LEC) to demonstrate that it is entitled to exogenous treatment. MCI states that Bell Atlantic's "quick and dirty" calculation of certain financial ratios fails to demonstrate that its specific circumstances are an unusual burden. *Id.* at 7.

6. In reply, Bell Atlantic states that Transmittal 473 reported that the estimated nationwide tax increase for 1992 is projected to be 6.2 percent, while Bell Telephone of Pennsylvania will experience an increase of 24.6 percent. Bell Atlantic Reply at 2. Thus, Bell Atlantic states, a tax increase that is four times the national average "certainly" has a disproportionate effect on BPA. *Id.* Bell Atlantic also states that because several of the taxes were capital-based, they have a disproportionate impact on telephone companies when compared to other businesses because telephone companies are capital-intensive businesses. *Id.* and n.6.

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[1] Price cap indices are composed of the following basic elements: (1) a measure of inflation less a productivity offset that recognizes how much more productive telecommunications common carriers are than the economy generally; and (2) specific exogenous costs changes that are the result of government action that would not otherwise be reflected in the first component. *See* Section 61.45(d) of the Commission's rules.

[2] 520 F.2d 182, 202 (D.C. Cir. 1975).

7. In defense of the methodology it used to measure the effect of taxes on the GNP-PI, Bell Atlantic states that it used an "extremely conservative" assumption in assessing the extent to which these increases would be built into the GNP-PI. *Id.* at 3. Bell Atlantic also disputes MCI's claim that the instant rate increase constitutes retroactive ratemaking, maintaining that the rate adjustment is not being applied to bills already rendered, but is being applied prospectively only. *Id.* at 4.[3]

III. DISCUSSION

8. A fundamental tenet of price cap regulation is that the increased earnings possible under incentive-based regulation yield reasonable rates only to the extent the carrier experiences increased risk. Although the basic price cap formula is intended to reflect, on an averaged basis, cost changes carriers are likely to expect, carriers are no longer insulated from every cost change they experience, as they generally were under rate of return regulation. Stated differently, the price cap index is intended to create a "benchmark" measure of cost changes. The added risk flows from the LEC's efforts to beat the benchmark -- *i.e.*, produce cost changes that are lower or less than the benchmark.

9. The basic component of the price cap formula, GNP-PI minus productivity, constitutes the benchmark cost changes that price cap carriers are challenged to meet. In fairness to both carriers and ratepayers, however, the basic measure of cost change can be further adjusted upward or downward to account for certain specified cost changes unique to the carrier. These are exogenous costs. The limited list of exogenous cost changes codified in the Commission's Rules at Section 61.45(d) allow the price cap to fluctuate in response to certain specific cost changes that are (1) imposed by government action; and (2) which are unique to or disproportionately affect common carriers. The Commission determined that these cost changes are not likely to be reflected in the inflation measure.[4]

10. Tax law changes are presumptively endogenous, *i.e.*, already taken into account in the GNP-PI and therefore in the price cap formula.[5] Tax law changes imposed by any level of government that uniquely or disproportionately affect LECs individually or as a class may, however, qualify for exogenous cost treatment.[6] If a tax can be shown to have unique or disproportionate effect on common carriers, then the amount of the exogenous adjustment must be examined carefully to determine if the cost changes at issue are already reflected in the GNP-PI inflation measure. Exogenous treatment of tax changes that are already accounted for in the GNP-PI would "double-count" their effect (once as an exogenous cost change and once in the GNP-PI), a result that is inconsistent with the goal of price cap regulation to encourage cost based rates.[7] The burden is on the LEC to show the absence of double counting.[8]

11. Of the three taxes which Bell Atlantic alleges will directly affect BPA, only the Public Utility Realty Tax (PURTA) will apply specifically to utility companies in the state of Pennsylvania. In recent cases in which the Bureau has considered exogenous treatment of tax increases under price caps, the tax was imposed on utilities only.[9] This treatment is consistent with the Commission's concern that, for a tax change to qualify as exogenous, it uniquely or disproportionately affect common carriers. Moreover, based on our examination of utility-specific taxes under price cap regulation and under rate of return regulation, these taxes tend to be comparatively small in relation to general business taxes, and are not large enough to have an impact on the GNP-PI. Utility-specific taxes are therefore difficult to distinguish from other types of exogenous costs named by the Commission, in that government action creates cost changes that no other type of business faces. Since price cap regulation was intended to simulate competitive conditions, risks, and rewards, but not to subject carriers to more risk than they would face under competitive conditions, exogenous treatment of utility taxes is consistent with the overall goal of price cap regulation.

12. The questions raised by Bell Atlantic's treatment of the other two general business taxes are more difficult. With respect to these taxes -- one on corporate net income and one a capital stock/franchise tax -- Bell Atlantic has made no showing that, as a common carrier, it is uniquely or disproportionately affected. It appears that these two tax increases impose the same tax rate on all businesses, so it is unclear what the alleged source of disproportionate impact is.[10] From the material submitted by Bell Atlantic, we must conclude that these two taxes apply generally to all businesses in the state of Pennsylvania.

13. Bell Atlantic has, however, focused its arguments on the double counting issue. To estimate state tax changes which are already reflected in the GNP-PI, Bell Atlantic obtained data on state tax changes which occurred in 1990. Conservatively assuming that all these tax changes which occurred flowed through to prices, and thus were reflected in the GNP for 1990, Bell Atlantic estimates that the state tax increases in 1990 were slightly more than 1/10 of 1 percent of the GNP. Applying this percentage to Bell Atlantic's revenue implies that an increase of $12.5 million was allowed Bell Atlantic in its 1991 annual filing due to the GNP-PI component of the price cap index.

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[3] On December 16, 1991, Sprint filed a rebuttal to Bell Atlantic's reply. By letter dated December 20, 1991, Bell Atlantic argues that this rebuttal is unauthorized and should be stricken from the record. As Sprint's rebuttal is, in fact, unauthorized pursuant to Section 1.45(c) of the Commission's Rules, 47 C.F.R. § 1.45(c), we hereby strike it from the record.

[4] *AT&T Price Cap Order*, 4 FCC Rcd 2873, 3063 (para. 256)(1989).

[5] *See* Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786, 6808 (para. 176) (1990) (*LEC Price Cap Order); modified on recon.*, 6 FCC Rcd 2637 (1991), *petitions for further recon. dismissed*, FCC 91-344, released Dec. 20, 1991, *further modified on recon.*, 6 FCC Rcd 4524 (1991) (*ONA Part 69 Order), petitions for recon. of ONA part 69 Order pending, appeal docketed, D.C. PSC v. FCC*, No. 91-1279 (D.C. Cir. June 14, 1991).

[6] *See LEC Price Cap Order* 5 FCC Rcd at 6808 (para. 177).

[7] *LEC Price Cap Order*, 5 FCC Rcd at 6808 (para. 176).

[8] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2668 (para. 69).

[9] *See, e.g.*, Rochester Telephone Company Tr. 148 and NYNEX Trs. 38 and 41, which dealt with a New York State tax on utilities.

[10] In its D&J, Bell Atlantic simply asserts, without support, that it will be disproportionately affected by these two taxes. Tr. 473 D&J at 1-3 - 1-4.

This methodology is incorrect. Bell Atlantic computed state tax changes as a percent of the total 1990 GNP when it should have computed the state tax changes as a percent of the dollar value of the change in the GNP-PI from fourth quarter 1989 to fourth quarter 1990. This percentage should then be applied to the change in the GNP-PI which was reflected in the Price Cap Index to obtain an estimate of the tax amount already reflected in the GNP-PI.

14. While this methodological flaw can ultimately be corrected, a second problem with the double-counting showing that Bell Atlantic makes is not readily correctable. Bell Atlantic's showing is an attempt to demonstrate that its current costs are growing faster than the basic inflation less productivity component of the price cap formula. Bell Atlantic's solution is to adjust the cap upward, in effect tailoring the cap to match its costs in a year in which its costs are rising faster than GNP-PI less a productivity factor. In future rate periods, however, tax changes in other states could produce a rising GNPPI less inflation factor that is increasing faster than Bell Atlantic's own costs. There is no mechanism in the price cap formula to force Bell Atlantic in those years to tailor the index to match its lower costs. As a result, the net effect of Bell Atlantic's plan to treat general tax increases as exogenous costs over time produces a systematic bias against ratepayers.[11]

15. Based on the omissions and flaws in Bell Atlantic's filing, we reject Transmittal 473. We recognize that the Public Utility Realty Tax is eligible for exogenous treatment under the price cap rules. Nevertheless, Bell Atlantic has not justified the increase that it filed. Therefore, we reject this transmittal.

IV. CONCLUSION AND ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 473, IS REJECTED.

17. IT IS FURTHER ORDERED that the petitions to reject, or alternatively, suspend and investigate Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 473, filed by MCI Telecommunications Corporation and US Sprint Communications Company Limited Partnership, ARE GRANTED.

18. IT IS FURTHER ORDERED that the rebuttal filed by US Sprint Communications Company Limited Partnership, dated December 16, 1991, IS STRICKEN FROM THE RECORD.

19. IT IS FURTHER ORDERED that the Bell Atlantic Telephone Companies SHALL FILE a supplement reflecting this rejection no later than five business days from the release of this Order. Special Permission No. 91-112 is assigned for this purpose.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[11] The LEC price cap system has been designed with a backstop mechanism that addresses the problem of a carrier unable to keep cost changes at or below the inflation less productivity component of the price cap index. Carrier earnings that fall below 10.25 percent in a base year trigger an upward adjustment in the price cap.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company — Transmittal No. 2152

Revisions to Tariff F.C.C. No. 68

ORDER

Adopted: February 10, 1992; Released: February 12, 1992

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. On November 15, 1991, Southwestern Bell Telephone Company (SWB) filed Transmittal No. 2152 to introduce an incentive to encourage customers to realign trunking arrangements to avoid exhausting access tandem capacity. Under its incentive program, if certain conditions are met SWB will exempt a customer from nonrecurring charges when the customer elects to realign tandem trunked facilities to direct end office trunks. The customer's trunks must be near capacity and the realignment must eliminate the need for SWB to invest the capital required to expand the access tandem. SWB also seeks to clarify its tariff to provide that customers will not be charged for a "rehome," which is the mandatory movement of subtending end office trunk groups from one access tandem to another. Tr. 2152 Description and Justification (D&J) at 1-1 through 1-5. The tariff is scheduled to become effective on February 13, 1992. For reasons discussed below, we reject Transmittal 2152.

II. PLEADINGS

2. On December 2, 1991, Allnet Communications Services, Inc. (Allnet) filed a petition to reject, or in the alternative, to suspend and investigate Transmittal 2152. Allnet insists that SWB should offer a price guarantee to customers ordering a realignment in the event the Commission's new transport rules make direct end office trunk routing more expensive than tandem routing. Allnet Petition at 1.[1] Allnet also disputes the conditions attached to the realignment offer.[2] First, Allnet claims it would actually incur charges for Feature Group B (FGB) tandem trunk to Feature Group D (FGD) direct end office upgrades. *Id.* at 2. Second, Allnet argues that requiring trunk realignments to be configured in 24 circuit thresholds is discriminatory because it favors customers larger than Allnet. *Id.* at 3. Finally, Allnet claims that offering realignment on a first come, first served basis is discriminatory because SWB is unclear about how it will notify its customers of an incentive opportunity. SWB, says Allnet, should notify customers of an offer 60 days in advance of the acceptance date. *Id.* Allnet also argues that SWB should be required to consult with its interexchange carrier customers prior to initiating a rehome. *Id.* at 4.

3. On December 12, 1991, SWB replied to Allnet. SWB asserts that the trunk realignment program is voluntary and customers concerned about the future effects of any Commission ruling do not have to participate. SWB Reply at 4. Allowing customers who took advantage of the incentive to switch back to tandem trunking, argues SWB, would undermine the purpose of the program since it could force the carrier to expand its tandems, which it is attempting to avoid in the first place. *Id.* SWB claims Allnet is confused about any charges it may incur and reiterates that it will offer upgrades of FGB tandem trunks to FGD direct trunks at no charge. *Id.* at 5. It contends that the 24 circuit threshold is not discriminatory but is simply based on engineering. It maintains that the first come, first served condition will be applied to all customers equally and that it routinely will give 60 to 90 days advance notice of any realignment offer. *Id.* at 5-6. Finally, SWB states it always determines on its own when to redistribute traffic through a rehome and recognizes the need to discuss network changes with its customers whenever necessary to minimize disruption. *Id.* at 7.

III. DISCUSSION

4. SWB's trunk realignment incentive is a new service for which proper cost support is required by the Commission. [3] At this time, SWB has not yet provided the Commission the cost data necessary to support this portion of Transmittal 2152. Indeed, SWB did not file any cost support with this transmittal. For this reason, we reject Transmittal 2152 as patently in violation of Section 61.49(g) of the Commission's Rules, 47 C.F.R. § 61.49(g).

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[1] *Citing* Transport Rate Structure and Pricing, Order and Further Notice of Proposed Rulemaking, CC Docket Nos. 78-72 and 91-213, 6 FCC Rcd 5341 (1991)(Commission proposes a new rate structure for switched transport, consisting of a flat-rate dedicated transport charge, a usage-based common transport charge, and a usage-based interconnection charge).

[2] The following conditions also apply to the incentive offer:

(1) SWB will provide a direct end office trunk for each tandem trunk of the same Feature Group or Basic Serving Arrangement.

(2) Direct trunks must be installed in trunk modules of 24 and directionality may be changed at the customer's option.

(3) Trunk realignment will be offered on a first come, first served basis where appropriate facilities exist.

D&J at 1-3 through 1-4.

[3] A new service is defined as any service that enlarges the range of offerings available to the customer and may also include a re-priced version of the existing service. *See* Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786, 6824 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.* 6 FCC Rcd 2637 (1991), *petitions for further recon. dismissed* , FCC 91-344, released December 20, 1991, *further modified on recon.* 6 FCC Rcd 4524 (1991) (*ONA Part 69 Order*), *petitions for recon. of ONA Part 69 Order pending, appeal docketed, D.C. PSC v. FCC*, No. 91-1279 (D.C. Cir. June 14, 1991).

5. Accordingly, IT IS ORDERED that Southwestern Bell Telephone Company's Tariff F.C.C. No. 68, Transmittal 2152, IS REJECTED.

6. IT IS FURTHER ORDERED that the petition to reject or suspend and investigate Southwestern Bell Telephone Company Tariff F.C.C. No. 68, Transmittal 2152, filed by Allnet Communications Services, Inc., IS GRANTED to the extent indicated herein, and otherwise IS DENIED.

7. IT IS FURTHER ORDERED that Southwestern Bell Telephone Company SHALL ISSUE revisions to the tariff no later than five business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice. For this purpose, Special Permission No. 92-94 is assigned and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies
Revisions to Tariff F.C.C. No. 2

Transmittal No. 581

ORDER

Adopted: February 10, 1992; Released: February 12, 1992

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On November 22, 1991, Ameritech Operating Companies (Ameritech) filed Transmittal No. 581 to introduce Signaling System 7 (SS7) as a nonchargeable Common Switching Optional Feature in addition to the existing multifrequency signaling for Feature Group D (FGD) originating and terminating minutes and for Feature Group B (FGB) terminating minutes. The tariff is scheduled to take effect on February 13, 1992.[1]

2. Allnet Communication Services, Inc. (Allnet) filed a petition to reject or suspend and investigate Transmittal 581 on December 9, 1991. Ameritech filed a reply on December 19, 1991.

3. Allnet contends that Ameritech has unlawfully bundled its SS7 signaling with its common channel signaling (CCS) network. Specifically, Allnet charges that an interstate access customer should not be limited to purchasing Ameritech's local CCS network service in order to obtain "nonchargeable" SS7 signaling. Allnet Petition at 1. Allnet insists that an interstate access customer should be allowed to purchase a CCS network from an alternate access provider, or to provide it itself, and alleges that Ameritech's tariff would eliminate those options. *Id.*

4. Allnet further argues that in this tariff offering Ameritech redefines the time at which access minutes will be measured using SS7. *Id.* Allnet charges that under existing multifrequency signaling, billing measurement does not commence until the interexchange carrier (IXC) sends back the first acknowledgment "wink" to the local exchange carrier (LEC) on the originating end of a call. *Id.* at 1-2. In contrast, asserts Allnet, Transmittal 581 would provide that signaling begin before the IXC has had an opportunity to respond to the initial communication, known as the Initial Address Message (IAM). *Id.* at 2. Allnet insists that there is a measurable difference between the launch of the IAM by the LEC's SS7 end office and the transmission of the acknowledgment by the IXC of approximately 0.1 second. *Id.* Therefore, says Allnet, Ameritech should be required to measure access minutes in the originating direction under SS7 call setup signaling using the same standard as that used with multifrequency signaling, *i.e.*, based on the first acknowledgment by the IXC. *Id.*

5. Ameritech replies that Allnet offers no citation to a Commission rule or section of the Communications Act which has been violated by Transmittal 581. Ameritech Reply at 1. Ameritech argues that unlawful bundling under the Commission's Rules does not occur merely because a regulated service must first be purchased in order to obtain another regulated optional feature. *Id.* at 2 (noting that FGD service must first be purchased in order to obtain 800 service). In addition, notes Ameritech, a waiver was granted to Southwestern Bell to offer signaling transfer point (STP) access as a means of accessing its CCS signaling network to obtain multiple services including line information database (LIDB) access service and SS7 signaling. *Id.* at 2-3.

6. In response to Allnet's claims that Ameritech has inappropriately redefined the time at which access minutes will be measured using SS7 signaling, Ameritech replies that Allnet is simply wrong. *Id.* at 3-4. Ameritech insists that billing will not commence earlier on the SS7 call than under multifrequency signaling, and notes that the proposed manner in which access minutes will be measured is consistent with the SS7 protocol developed by the Consultative Committee for International Telephone Telegraph and the American National Standards Institute. *Id.* at 4. Ameritech further argues that the method of measuring originating access minutes is completely consistent with Section 69.2(a) of the Commission's Rules, 47 C.F.R. § 69.2(a), which effectively requires acknowledgment from the IXC for recognizing originating access minutes. *Id.*

7. The Common Carrier Bureau has reviewed Ameritech Transmittal No. 581, and all associated pleadings and revisions. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

8. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate Ameritech Operating Companies, Tariff F.C.C. No. 2, Transmittal No. 581, filed by Allnet Communication Services, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[1] On February 6, 1992, Ameritech filed Transmittal No. 605 to make certain changes to the revisions filed in Transmittal 581.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-584

In re Applications of

EDWIN A. BERNSTEIN	File No. BPH-870330NC
RADIO CENTER MORICHES LIMITED PARTNERSHIP	File No. BPH-870331MV
DAKK, INC.	File No. BPH-870331ND
FRIENDSHIP COMMUNICATIONS, LTD.	File No. BPH-870415KS
HAMPTON COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870415KY

For Construction Permit for New FM Station, Channel 241A, Center Moriches, New York

MEMORANDUM OPINION AND ORDER

Adopted: February 10, 1992; Released: February 21, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. The Review Board has before it for consideration an Appeal filed pursuant to 47 CFR § 1.301(a)(2) on January 13, 1992 by DAKK, Inc. (DAKK) from the *Order*, FCC 92M-27, released January 8, 1992 (*Order*), of Administrative Law Judge Edward Luton (ALJ), directing that depositions may be taken over a claim of attorney-client privilege. Oppositions to the appeal were filed on January 21, 1992 by Edwin A. Bernstein and Friendship Communications, Ltd. (Friendship), the parties which had jointly filed notices of deposition with the ALJ. And, on January 27, 1992, DAKK submitted a request for permission to submit a Reply to the Oppositions. [1] For the reasons that follow, we will dismiss the Appeal and return the matter to the ALJ for further consideration of the underlying privilege claim.

BACKGROUND

2. Upon review of the exceptions filed in this proceeding, and after affording DAKK an opportunity to supplement the record so as to clarify certain matters surrounding its claim of reasonable assurance of financing, *Memorandum Opinion and Order*, 6 FCC Rcd 2875 (Rev. Bd. 1991), we were constrained to remand this proceeding for further hearing because of material and substantial questions raised by DAKK's response. *Memorandum Opinion and Order*, 6 FCC Rcd 6841 (Rev. Bd. 1991). Specifically, we remanded on issues to determine whether DAKK had violated 47 CFR § 1.65 and/or deliberately attempted to conceal; whether DAKK lacked candor in the prosecution of its case or in pleadings filed in this proceeding; and whether DAKK has reasonable assurance of a loan from CVC Capital Management.

3. Subsequent to our remand, Bernstein and Friendship filed discovery requests seeking document production as well as permission to take depositions of six named individuals, including Thomas Hart, Esq. and David Honig, Esq., who represent DAKK as legal counsel in this proceeding. DAKK opposed these discovery requests and sought a protective order. The ALJ granted all of the discovery requests, holding that the requested documents shall be produced and that any documents for which attorney "work product" is claimed or attorney-client privilege is asserted shall be submitted to the presiding officer for *in camera* inspection, together with citations to authorities believed to support each claim. As for the depositions, the ALJ held that: "|T|he proposed depositions of |the named individuals| appear reasonably calculated to lead to the discovery of admissable evidence. Their depositions may be taken." *Order*, at para. 3. It is only the latter ruling pertaining to depositions that DAKK now appeals and, more specifically, it objects only to the taking of the depositions of Messrs. Hart and Honig.

APPEAL

4. In its appeal from the ALJ's *Order*, DAKK acknowledges that it sought and obtained its counsel's legal advice, but argues that it explicitly declined to waive the attorney-client privilege. In support, it refers to the following language in its Opposition to the discovery requests, filed with the ALJ on November 29, 1991, at pp. 4-5:

> Thomas Hart and David Honig represent DAKK. They have been DAKK's only lawyers throughout this case. They are both sole practicioners. They provide legal advice to DAKK concerning the matters as issue here, and they filed pleadings in this case on DAKK's behalf.
>
> However, at no time has DAKK waived the lawyer-client privilege. Standing alone, the fact that a broadcast applicant employed counsel or received advice from counsel does not constitute a waiver of the privilege. Otherwise, no applicant receiving advice from counsel would have any privilege. Here, the risk that counsel might have to withdraw would impose a severe burden on DAKK, inasmuch as DAKK has no other counsel.[3] Under these circumstances -- or at least until a much stronger showing of need is made on the basis of Mr. Foster's deposition testimony -- the extreme step of requiring the testimony of counsel should not be taken.

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[3] Mr. Honig's part-time associate, Ronda Robinson, practices before the Commission. She has not participated in, and is unfamiliar with this case. Inasmuch as this case is nearly five years old, it

would impose an extreme burden on DAKK to require it to compensate Ms. Robinson, or any other lawyer, to learn the case from scratch.

Although the ALJ's *Order* did not mention its privilege claims in the context of the proposed depositions of counsel, DAKK argues that the ALJ implicitly recognized that it did not waive its rights when he ordered production of documents for *in camera* inspection to determine whether the "work product" and attorney-client privileges apply to them. Should its counsel be required to give deposition testimony, DAKK claims, its privilege will have been waived, thus rendering moot the ALJ's allowance for *in camera* document production. DAKK maintains that only where the doctrine of "exception" applies, that is, where the "client . . . consults an attorney for advice that will serve him in the commission of a fraud," citing *WWOR - TV, Inc.*, 5 FCC Rcd 4113, 4115 n.8 (Rev. Bd. 1990), *rev. granted*, 5 FCC Rcd 6261 (1990), does the privilege disappear for all purposes. Here, however, the ALJ did not cite or rely on that doctine, and DAKK concludes that it would be premature to apply it until the ALJ has at least had an opportunity to review *in camera* all potentially privileged documents.

5. In its opposition to the appeal, Friendship argues that the issue is not one of waiver of the attorney-client privilege or selective diclosure through deposition, but is whether counsel for DAKK, in pleadings before the Board, lacked candor and intentionally withheld decisionally significant information about DAKK's financial qualifications. Because of the nature of the issues added by the Board, Friendship states, the depositions of DAKK's counsel are reasonably calculated to lead to the discovery of admissible evidence and must proceed because DAKK's conduct falls within the "exception" doctrine. For its part, Bernstein echoes the view that counsel's depositions are relevant to the remand issues, and adds that both Honig and Hart are now obligated to withdraw as DAKK's counsel pursuant to Rules 3.1, 3.3, 3.4, and 3.7 of the District of Columbia Rules of Professional Conduct.

DISCUSSION

6. As the Commission has stated many times: "The purpose of the attorney-client privilege is to protect confidential communications by a client to his or her lawyer for the purpose of obtaining legal advice." *WWOR-TV, Inc.*, 5 FCC Rcd 6261, 6262 (1990); *Georgia Public Telecommunications Commission*, 5 FCC Rcd 1450 (1990). Although the attorney-client protection is a venerable legal principle, the parties correctly point out that, in appropriate circumstances, it is limited by the common law doctrine of "exception," which "comes into play when a privileged relationship is used to further a crime, fraud, or other fundamental misconduct." *In re Sealed Case*, 676 F.2d 793, 807 (D.C. Cir. 1982). Here, the narrow question presented is whether DAKK has abused the relationship by consulting its attorneys "for advice that will serve [it] in the commission of a fraud . . . ." *See Clark v. U. S.*, 289 U.S. 1, 16 (1933).[2] This, however, is a question to be answered initially by the ALJ.

7. In the ruling before us, the ALJ simply held that the requested depositions could be taken because they "appear reasonably calculated to lead to the discovery of admissible evidence." *Order*, para. 3. Beyond citing this general rule of discovery, however, *see RKO General, Inc.*, 97 FCC 2d 423, 426-427 (1984), the ALJ did not address either DAKK's claim of privilege regarding counsels' depositions, nor specifically discuss the doctrine of "exception," let alone hold that the "exception" limitation vitiated the privilege in this instance. In the federal courts, it is well-established that: "[T]he determination whether the government has made a sufficient showing to invoke the exception is committed to the sound discretion of the District Court in the first instance." *Sealed Case*, 676 F.2d at 813; *In re Berkley & Co.*, 629 F.2d 548, 553 (8th Cir. 1980); *In re Special September 1978 Grand Jury (II)*, 640 F.2d 49, 59 (7th Cir. 1980). In the same vein, the Board has previously held in circumstances akin to those presented here that the best course, *ab initio*, is to return the privilege claim to the ALJ so that he may reconsider his ruling after he affords the parties an opportunity to fully brief the legal issue of the applicability, *vel non*, of the "exception" doctrine. *Welch Communications, Inc.*, 5 FCC Rcd 7066, 7067 (Rev. Bd. 1990). We adopt the same course here.

8. In so doing, however, we offer some preliminary guidance to the parties and the ALJ. First and foremost, a mere allegation of wrongdoing will not destroy the privilege; rather, there must be "prima facie evidence that [the charge] has some foundation in fact." *Clark v. U. S.*, 289 U.S. at 16. And, second, there must be some reasonable relationship between the advice or work product and the subject matter of the possible violation. *In re John Doe Corp.*, 675 F.2d 482, 492 (2nd Cir. 1982). The requirement of a *prima facie* showing may be met by evidence that the client was engaged in, or planning, a criminal or fraudulent scheme when it sought the advice of counsel, or that the client actually committed or attempted such acts subsequent to receiving the benefit of counsel's work product or advice, or that the work product itself was prepared as part of the ongoing misconduct. In some circumstances, the *prima facie* evidence may also consist of the attorney's misconduct. *Sealed Case*, 676 F.2d at 815; *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3rd Cir. 1979); *In re Murphy*, 560 F.2d 326, 338 (8th Cir. 1977); John Do e Corp., 675 F.2d at 492; Moody v. IRS, 654 F.2d 795, 799-800 (D.C. Cir. 1981). Thus, and bearing these general principles in mind, we entrust in the first instance the question to the discretion of the ALJ, [3] but we add that any future appeal to the Board must be supported by full ventilation of the important legal points involved.

9. ACCORDINGLY, IT IS ORDERED, That the Appeal filed January 13, 1992 by DAKK, Inc. IS DISMISSED, and that the subject privilege claim IS REMANDED to the ALJ for further consideration in accordance with this opinion. [4]

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] We will deny DAKK's request for permission to file a reply pleading. Under the Commission's rules, 47 CFR § 1.301(c)(7), replies to oppositions to appeals from interlocutory rulings are not permitted unless specifically requested and the Board has not requested them here. (We note that DAKK's pleading was also misdirected to the ALJ.) Moreover, DAKK's pleading indicates that its reply would be largely repetitive of the position it has stated in its appeal. Insofar as it also seeks to respond to the suggestion that its attorneys withdraw as counsel *(see* para. 5, *infra)*, this is not a matter directly presented by the appeal and we will not address it. *See Welch Communications, Inc.*, 4 FCC Rcd 3979, 3981 (Rev. Bd. 1989).

[2] At times in its appeal, DAKK seems to focus on claiming attorney "work product" in addition to attorney-client privilege. (Br. at 2-3) The doctrine of "exception" applies to both privileges, however, and focuses on their misuse. In any event, because the work product privilege is broader than and subsumes the purposes of the attorney-client privilege, application of "exception" to the former automatically covers the latter. *See Sealed Case*, 676 F.2d at 808-809, 812. Our discussion of general guidelines, *infra* para. 8, is consistent with this understanding.

[3] By virtue of his *Order* for document production, which is not here under appeal, the ALJ is also in a better position than the Board to determine, on the basis of his *in camera* inspection, whether *prima facie* evidence of misconduct sufficient to eviscerate the privilege is present. *See Sealed Case*, 676 F.2d at 815 ("In appropriate cases the subpoenaed material itself may provide *prima facie* evidence of a violation"); *Special September 1978 Grand Jury (II)*, 640 F.2d at 56-57.

[4] Because the parties are in the midst of the discovery period, pre-publication copies of this ruling have been made available to them and to the ALJ.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of:

R. DONNIE GOODALE File No. BPH-890615MF

For a Construction Permit
for a New FM station on
Channel 277A in
Lenoir, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: February 6, 1992; Released: February 21, 1992

By the Commission:

1. The Commission has before it a petition for reconsideration filed December 31, 1990, on behalf of R. Donnie Goodale ("Goodale"). Goodale seeks reconsideration of the Mass Media Bureau's ("Bureau") action dismissing his application for a construction permit (FCC Form 301) for a new commercial FM station in Lenoir, North Carolina. *See Sundown Communications (Hearing Designation Order)*, 5 FCC Rcd 7079 (M.M. Bur. 1990). Goodale's petition for reconsideration was referred to the Commission pursuant to 47 C.F.R. Section 1.104(b).

2. *Background.* Goodale submitted his application for the Lenoir facility on June 15, 1989. On September 13, 1989, the application was accepted for tender, triggering a 30 day period for Goodale to file curative amendments affecting the acceptability or grantability of the application. *See* 47 C.F.R. Section 73.3522(a)(6). Goodale did not file an amendment during this period of time. Thereafter, Goodale's application underwent engineering review by the staff. This review revealed that the geographic coordinates for the proposed transmitter site listed in Section V-B of Goodale's application conflicted with the coordinates for the site as plotted on the transmitter site map.[1] Goodale's application was, therefore, dismissed in the *Hearing Designation Order* designating for hearing eight remaining mutually exclusive applications for the Lenoir facility.[2]

3. *Petition for Reconsideration.* In order to be favorably considered, a petition for reconsideration must establish that the action taken by the Commission or designated authority for which reconsideration is sought involved findings of fact or conclusions of law which were erroneous. *See* 47 C.F.R. § 1.106(d)(2). Goodale's petition does not dispute the staff's finding of coordinate discrepancy. Rather, Goodale concedes that there is a discrepancy between the coordinates consistently used in Section V-B of his application and those shown on his transmitter site map. However, Goodale states that the coordinates shown on the transmitter site map are the correct coordinates and that the discrepancy could have been confidently and reliably resolved by the Commission, from information contained in the application as a whole. Specifically, Goodale believes that the correct set of coordinates could have been determined by utilizing the narrative description of the transmitter site as provided in response to Item 2a of Section VB in the application. Goodale also asserts that the Commission action with respect to his proposal was arbitrary and capricious and contrary to existing law in light of the Commission having accepted for filing the applications of others similarly situated. Goodale cites numerous cases where applicants purportedly were allowed to amend their applications to correct coordinate discrepancies. Having allowed other applicants to correct similar defects via amendments, Goodale asserts, the Commission must reinstate his application and give him the same opportunity to amend. Finally, Goodale alternatively argues that pursuant to the Commission's *James River* policy he should be afforded the opportunity to file a minor curative amendment to correct this coordinate discrepancy, as his application was substantially complete as originally filed.

4. *Discussion.* The Commission has consistently affirmed the Bureau's dismissal of applications containing inconsistent geographic coordinates for the proposed transmitter sites. *See R.A.D. Broadcasting Corporation*, 4 FCC Rcd 4772 (1989); *Benjamin Macwan*, 4 FCC Rcd 4769 (1989); *Steven B. Courts*, 4 FCC Rcd 4764 (1989); and *Nicholasville Broadcasting Corporation*, 4 FCC Rcd 2574 (1989). As we stated in the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985) (*"Report and Order"*), which established our FM "hard look" processing standards, an accurate showing of the geographic coordinates is necessary to an acceptability determination.[3] *See* 50 Fed. Reg. at 19945. The geographic coordinates, to the nearest second, of the proposed transmitter site are critical to processing the application. If the

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[1] Goodale specified coordinates of 35°58'40" N.L., 81°34'27" W.L. in Section V-B of his application whereas the plotted coordinates on the site map were 35°58'40" N.L., 81°34'42" W.L.

[2] The staff incorrectly characterized the site coordinates defect in Goodale's application as a tenderability, rather than an acceptability, defect. In any event, such a defect, if established, warrants return of the application regardless of its characterization as a tender or acceptance deficiency. *See Steven B. Courts*, 4 FCC Rcd 4764, n.3 (1989).

[3] Paragraph 4 of Appendix D of the *Report and Order* states, in part:

> Compliance with the Commission's technical rules is evaluated in the course of an acceptability study. Certain engineering data must be present for such a technical acceptability study to be made. The absence of one or more elements of those data, listed below, prevents a determination of acceptability and thus renders the application not substantially complete.
>
> a. The geographic coordinates, to the nearest second, of the proposed transmitter site must be provided...
>
> ....
>
> If any of the above information is present but, on the face of the application, visibly incorrect or inconsistent, the application will be treated in accordance with the following guidelines. If the needed information can be derived or the discrepancy resolved, confidently and reliably, drawing on the application as a whole, such defect will

staff is unable to determine the location of the proposed transmitter site because of a discrepancy between the location of the site as listed in the application and as plotted on the transmitter site map, the staff cannot evaluate, *inter alia*, the site availability certification or the information supplied for FAA approval. Not knowing a transmitter location also makes it impossible to determine the distance from the proposed site to other proposed or existing broadcast facilities and to the community of license. The geographic location also determines whether protection must be afforded to monitoring facilities and to radio quiet zones (*See* 47 C.F.R. § 73.1030), marks the center of the "blanketing" area (47 C.F.R. § 73.315) and is fundamental to an analysis of a proposal's environmental and electromagnetic effects. The discrepancy in site coordinates in Goodale's application, therefore, made it impossible to determine, from the face of the application, whether the proposal complied with these Commission acceptability criteria. *See Steven B. Courts*, 4 FCC Rcd at 4764.

5. Appendix D of the *Report and Order* states that if "on the face of the application [the coordinates are] visibly incorrect or inconsistent," and the discrepancy cannot be resolved "within the confines of the application and with a high degree of confidence, the presence of the clearly void data will be treated as functionally equivalent to the absence of such data." 50 Fed. Reg. at 19946. Goodale asserts that the staff could have confidently and reliably determined the correct coordinates for his transmitter site. Specifically, Goodale argues that the Commission staff could have confidently concluded that the location of the transmitter was correctly depicted on the topographic site map because the narrative description of the transmitter site, as provided in the application, places the transmitter site where it is plotted on the transmitter site map and not where it is listed elsewhere in the application. Furthermore, Goodale alleges, the ground elevation data provided in Section V-B of the application matches the plotted map site elevation and is inconsistent with the ground elevation at the site described by the coordinates. Finally, Goodale argues (1) that his consulting engineer *"did not* rely on geographic coordinates provided by the land owner" and (2) "that the engineer engaged in mathematical interpolation to compute the geographic coordinates of the proposed transmitter site *based on the site location marked on the map"* (emphasis in original). Petition at page 7.

6. In response to Item 2(a) of Section V-B, FCC Form 301, Goodale has described his proposed transmitter site as "1.2 KM WSW of intersection of US Highway 321 and State Road 268 and 9 KM NNW of the center of Lenoir, Caldwell, NC." This narrative description of the proposed transmitter site lacks the specificity necessary for the staff to conclude, with the requisite degree of confidence, that the geographic coordinates of the site intended were specified incorrectly throughout the application, but plotted correctly on the site map.[4] Furthermore, the fact that the site elevation specified consistently throughout the application corresponds to the site plotted on the map does not establish that the depicted site was accurately plotted on the site map. In order for the staff to reach the conclusion Goodale's petition would have it reach, it would have been necessary to *assume* in the first instance that the plotted site was the correct one. It is equally reasonable to assume that Goodale intended the site depicted by the geographic coordinates listed in Section V-B of the application, had misplotted the site on the map, and therefore, specified the wrong site elevation throughout the rest of the application based on information derived from an inaccurately plotted site. Moreover, in the application, Goodale's consulting engineer stated that "geographic coordinates for the proposed antenna structure have been determined by interpolation of U.S.G.S. 7-1/2 minute quadrangle data". He did not state that the specific topographic site map supplied with the application (Annex 2.0) was the source map used in deriving the stated coordinates. Thus, the only conclusion that the staff could reach with respect to the location of Goodale's transmitter site was that *one* set of coordinates contained in the application was incorrect: either the coordinates were inaccurately listed in Section V-B, Item 4 of FCC Form 301, *or* the coordinates were incorrectly plotted on the 7.5-minute topographic site map. Consequently, we cannot agree with Goodale that the staff could have concluded, with the requisite degree of confidence, that the geographic coordinates of the site intended were specified incorrectly throughout Section V-B of the application, but plotted correctly on the site map.

7. In his petition, Goodale also cites cases where he claims the Commission has permitted applicants with site coordinate discrepancies to amend to cure this defect. The cases he cites, however, are inapposite. Unlike Goodale, most of the applicants in the cited cases proposed to mount their antennas on existing, licensed towers.[5] If an applicant has specified inconsistent data but clearly pro-

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not render the application not sufficient for tender. However, if the critical data cannot be derived or the inconsistency resolved within the confines of the application and with a high degree of confidence, the presence of the clearly void data will be treated as functionally equivalent to the absence of such data.

50 Fed. Reg. at 19946.

[4] Goodale's description of the transmitter site actually leads to two possible sites. Our analysis would indicate that "1.2 KM WSW of the intersection of U.S. Highway 321 and State Road 268" results in coordinates $35^{0}58'37"$ N.L., $81^{0}34'44"$ W.L. These coordinates lie at a distance of 0.096 km from the site indicated on the site map and 0.436 km from the site specified in Section V-B. Likewise, our analysis indicates that utilizing the description "9 KM NNW of the center of Lenoir" results in coordinates $35^{0}59'19"$ N.L., $81^{0}34'39"$ W.L. These coordinates lie at a distance of 1.206 km from the site indicated on the site map, 1.239 km from the site indicated in Section V-B and 1.301 km from the site determined from the previous "crossroads" description. Thus, the staff clearly could not determine the correct site from the narrative description in the application, as Goodale insists; these two possibilities not only are inconsistent but do not correspond to either of the coordinates described in note 1 *supra*.

[5] The cases cited are: *Peter J. Rinaldi*, 5 FCC Rcd 5649 (MM Bur. 1990); *Caprock Educational Broadcasting Foundation*, 5 FCC Rcd 5170 (MM Bur. 1990); *Carta Corporation*, 3 FCC Rcd 798 (MM Bur. 1988); *The Cromwell Group, Inc.*, 5 FCC Rcd 7092 (MM Bur. 1990); *Patrick R. Robinson*, 5 FCC Rcd 5146 (MM Bur. 1990); *PN Radio Company*, 2 FCC Rcd 5540 (MM Bur. 1987); *Charles Saltzman*, 2 FCC Rcd 4449 (MM Bur. 1987); *Radio Trinity, Inc.*, 8920-KS (March 17, 1987).

poses to locate its antenna on an existing tower to which specific reference is made in its application, the staff takes official notice of data specified in Commission records for the licensed facilities and thus often can confidently and reliably resolve the inaccuracy or inconsistency in the data given for the proposed tower location or height. *See Steven B. Courts*, 4 FCC Rcd at 4766. *See also David T. Murray*, 5 FCC Rcd 5770 (1990). The Commission has previously rejected the argument that applicants such as Goodale are similarly situated with applicants whose proposals contain site coordinate discrepancies which may be resolved because the application refers to an existing licensed tower as the intended transmitter site. *See Steven B. Courts*, 4 FCC Rcd at 4766.

8. Goodale also cites a Review Board decision[6] which permitted a post designation amendment of an application to cure a site coordinate defect as requiring us to permit similar amendments at the pre-designation stage. That decision is inconsistent with Commission precedent, however, and thus is not controlling here.[7] In any event, even if the Review Board decision were good law, it made an exception to the "hard look" rules for applications designated for hearing, which is not the case here. Another case involved amendments allowed due to the late issuance of a Notice of Tender for a group of mutually exclusive applications.[8] In the situation where the Commission reinstates an application and accepts it for tender, all applicants mutually exclusive with that application are afforded the opportunity to file amendments during the later amendment period triggered by the later Notice of Tender. *See Memorandum Opinion and Order* in MM Docket 84-750, 50 Fed. Reg. 43157 (October 18, 1985)(reconsideration of *Report and Order)*. Yet another case cited by Goodale involved an erroneous calculation, unrelated to coordinate discrepancies or other acceptability defects, which the applicant was ordered to correct by amendment.[9] A final distinguishable case involved coordinate discrepancies that occurred in a late filed amendment submitted for "good cause" pursuant to 47 C.F.R. § 73.3522(a)(2) because of an unforeseeable FAA problem with the site.[10] That amendment was not required to conform to the "hard look" processing requirements and did not cure tenderability or acceptability defects in the underlying application. *See The Taber Broadcasting Company of New Mexico*, 4 FCC Rcd 7892 (1989); *see also Pike Family Broadcasting, Inc.*, 6 FCC Rcd 5552 (1991).

9. Finally, Goodale contends that the error in his application was readily correctable by a minor amendment and that, consequently, the Commission does not have the discretion to reject his application without a hearing pursuant to the precedent established in *James River Broadcasting Corp v. FCC*, 399 F.2d 581 (D.C. Cir. 1968). However, the Commission's processing rules which were the basis for *James River* were changed by the "hard look" processing procedures established in the *Report and Order*. *See e.g. Richard P. Bott, II*, 3 FCC Rcd at 6063; *Ann D. Genthner*, 1 FCC Rcd 399 (1986); *Matthew D. Wiggins, Jr.*, 1 FCC Rcd 401 (1986); *Joanne Brehm*, 1 FCC Rcd 403 (1986); and *Star Signal Corporation*, 1 FCC Rcd 450 (1986). Pursuant to the rules adopted in that *Report and Order*, the time frame in which Goodale was entitled to file his minor curative amendment to correct his geographic coordinate discrepancy was the 30-day period immediately following the appearance of his application on the September 13, 1989 Notice of Tender. *See* 47 C.F.R. § 73.3522(a)(6).[11]

10. Accordingly, for the foregoing reasons the petition for reconsideration, filed by R. Donnie Goodale, IS DENIED.[12]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[6] *George Henry Clay*, 5 FCC Rcd 317 (Rev. Bd. 1990).

[7] *See Pueblo Radio Broadcasting Service*, 5 FCC Rcd 6278 (1990).

[8] *Rebecca Radio of Marco*, 2 FCC Rcd 4053 (MM Bur. 1987).

[9] *Hutchinson Broadcasting Co.*, 5 FCC Rcd 7447 (MM Bur. 1990).

[10] *RC Communication, Inc.*, 5 FCC Rcd 3165 (MM Bur. 1990). In that case, although the staff did not have to scrutinize the amendment's inconsistent site coordinates under "hard look" review, it found that the correct coordinates could be confidently and reliably determined, based on the application as a whole, looking specifically to the coordinates listed on the applicant's FAA Form 7460-1. *Id.* at 3167.

[11] In a recent Notice of Proposed Rule Making in MM Docket No. 91-347, we proposed to modify or eliminate the FM "hard look" processing rules, but stated that any such change would only apply to applications filed after the effective date of the rule changes. *Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications*, 6 FCC Rcd 7265 (1991).

[12] On December 31, 1990, Goodale filed a pleading to stay the Lenoir, North Carolina comparative proceeding pending Commission action on his petition for reconsideration. In light of the action taken herein, this request for stay is dismissed.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 21, 1992

STATES THAT HAVE CERTIFIED THAT THEY REGULATE POLE ATTACHMENTS

Pursuant to Section 1.1414(b) of the Commission's Rules on cable pole attachments, the following states* have certified that they regulate rates, terms, and conditions for pole attachments, and, in so regulating, have the authority to consider and do consider the interests of subscribers of cable television services, as well as the interests of the consumers of the utility services. Moreover, these states have certified that they have issued and made effective rules and regulations implementing their regulatory authority over pole attachments, including a specific methodology for such regulation which has been made publicly available in the state.

Certification by a state preempts the FCC from accepting pole attachment complaints under Subpart J of Part 1 of the Rules.

Alaska
California
Connecticut
Delaware
District of Columbia
Idaho
Illinois
Kentucky
Louisiana
Maine
Massachusetts
Michigan
New Jersey
New York
Ohio
Oregon
Utah
Vermont
Washington

* "state" by Section 1.1402(g) of the Rules, means any state, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

This Public Notice supersedes the Public Notice of December 30, 1987, DA No. 87-1862.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re the Applications of

MOBILECOMM OF MEMPHIS, INC.

For authority to relocate control and standby frequency 72.42 MHz operating under PLMS Call Sign KRS656 to 5050 Poplar Street, Memphis, Tennessee — File No. 26342-CD-P/ML-01-91

and

For authority to relocate control and standby frequency 72.30 MHz operating under PLMS Call Sign WRV913 to 5050 Poplar Street, Memphis, Tennessee — File No. 26343-CD-P/ML-01-91

and

For authority to relocate control and standby frequency 72.88 MHz operating under PLMS Call Sign KDT223 to 5050 Poplar Street, Memphis, Tennessee — File No. 26344-CD-P/ML-01-91

and

For authority to relocate control and standby frequency 72.20 MHz operating under PLMS Call Sign KRS656 to 5050 Poplar Street, Memphis, Tennessee — File No. 26345-CD-P/ML-01-91

and

For authority to relocate control and standby frequency 72.26 MHz operating under PLMS Call Sign KWU331 to 5050 Poplar Street, Memphis, Tennessee — File No. 26354-CD-P/ML-01-91

and

For authority to relocate control and standby frequency 72.14 MHz operating under PLMS Call Sign KDT223 to 5050 Poplar Street, Memphis, Tennessee — File No. 26355-CD-P/ML-01-91

ORDER

Adopted: February 13, 1992; Released: February 21, 1992

By the Chief, Mobile Services Division:

1. MobileComm of Memphis, Inc. (MobileComm) submitted the above-captioned applications, to relocate those control antennas, to the Commission in June of 1991. The applications were granted in error and later set aside, due to a pending petition.

2. The Mobile Services Division (MSD) and MobileComm have reached an agreement that resolves matters, more specifically set forth in the attached Consent Decree, which relate to these applications. The terms and conditions of this agreement are contained in the attached Consent Decree.

3. The MSD has reviewed the terms of the Consent Decree and evaluated the circumstances of this case. We find that the public interest would be served by approving the Consent Decree, the terms of which are incorporated herein by reference.

4. Accordingly, IT IS ORDERED that the Consent Decree IS ADOPTED.

5. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

CONSENT DECREE

1. This Consent Decree (the "Decree") is made as of this 13th day of February, 1992 between MobileComm of Memphis, Inc. ("MobileComm") and the Federal Communications Commission pursuant to Sections 1.80 and 1.93-1.95 of the Commission's Rules, 47 C.F.R. §§ 1.80, 1.93, 1.94 and 1.95 (1990).

2. MobileComm holds licenses issued by the Commission to provide common carrier paging services on frequencies 152.18 MHz, 152.24 MHz, 158.70 MHz, 454.175 MHz, 454.200 MHz and 931.8125 MHz in Memphis, Tennessee, and its environs. On June 24, 1991, MobileComm applied to the Commission for authority to relocate certain of its antennas (the "six control antennas") which transmit the various 72 MHz frequencies MobileComm uses to control its transmitters providing paging service on the frequencies set forth above. The Commission granted MobileComm special temporary authority to operate its control facilities at the new location, 5050 Poplar Street, Memphis, Tennessee. The applications were placed on public notice by the Commission as acceptable for filing.

3. On August 19, 1991, Beepers Plus ("Beepers") filed a petition to deny MobileComm's applications alleging that transmissions from MobileComm's proposed facilities were causing interference to the receive antenna for Beepers's 72.06 MHz control facility. In September 1991, the Commission erroneously granted the MobileComm applications despite the fact that the Beepers's petition was pending. The grants were promptly set aside in October 1991.

4. The Mobile Services Division arranged a settlement conference with MobileComm and Beepers. At that time, MobileComm indicated that it had not been served with a copy of the petition to deny. Copies of the public notice which set aside the application grants and the petition to deny were delivered to MobileComm on January 17, 1992.

5. Settlement discussions were held on January 23, 1992. Subsequently, Beepers and MobileComm came to an agreement concerning the matters raised in the petition.

6. Based upon discussions between the Mobile Services Division staff and MobileComm, the Mobile Services Division believes that a prima facie case exists that the following violation of the Commission's Rules apparently occurred:

That from January 17 to February 10, 1992, MobileComm knowingly operated its six control antennas at an unauthorized location, 5050 Poplar Street, Memphis, Tennessee.

However, during that time MobileComm was attempting to resolve the pending litigation regarding the relocation of those antennas.

7. For the purposes of this Decree, the following definitions apply:

a. "MobileComm" shall mean MobileComm of Memphis, Inc., or any of its successors in interest.

b. "Order" shall mean any order of the Commission's Mobile Services Division adopting the terms and conditions of this Decree, subject to MobileComm's compliance with the terms in paragraph 11 of this Decree.

c. "Parties" shall mean (i) MobileComm and (ii) the Commission, or any person acting for the Commission under delegated authority.

8. MobileComm admits the jurisdiction of the Commission over it for purposes of this Decree and any Order effectuating this Decree. All necessary jurisdictional facts are hereby admitted for purposes of this Decree.

9. MobileComm waives any rights it may have to the usual preparation and review of a decision and any rights of judicial review or rights otherwise to challenge or contest the validity of any Order effectuating this Decree. The Parties agree that upon signing by MobileComm and the Mobile Services Division, the provisions of this Decree shall be incorporated by reference in the attached Order formally adopting this Decree.

10. This Decree is for purposes of settlement only, and its signing does not constitute an admission by MobileComm of any violation of law, rules or policy.

11. In consideration for the Commission's entering into this Consent Decree, and in order to avoid litigation costs, the parties hereby agree that MobileComm shall make a voluntary contribution to the United States Treasury, without further protest or recourse, in the amount of $8,000 within thirty (30) days of the date on which the Order is released. MobileComm agrees that the contribution of $8,000 to the United States Treasury may not be claimed as a tax deduction.

12. In light of the covenants and representations contained in this Decree, and in express reliance thereon, the Commission agrees that it will take no further action concerning the matters

at issue and will issue an Order effectuating this Decree; provided, however, that the Parties further agree that this Decree does not constitute any findings or admission that any intentional violation occurred.

13. The Parties agree that any violation of an Order incorporating the terms of this Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to enforcement of a Commission order.

14. If this Decree is rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any fashion in a legal proceeding.

15. If the Commission brings an action in any United States District Court to enforce the terms of an Order incorporating the terms of this Decree, MobileComm agrees that it will not contest the validity of the Order, will waive any statutory right to a trial de novo, and will consent to a judgment incorporating the terms of this Decree.

IN WITNESS WHEREOF the parties hereto have executed this Consent Decree as of the date and year first written above.

FEDERAL COMMUNICATIONS COMMISSION
COMMON CARRIER BUREAU
MOBILE SERVICES DIVISION

By: _____
Gregory J. Vogt, Chief

MOBILECOMM OF MEMPHIS, INC.

By: W N Stacy
W. N. Stacy, Vice President - Engineering

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Certain Broadcast Stations
Serving Communities in the
State of Louisiana

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: January 30, 1992; Released: January 31, 1992

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration: (i) license renewal applications from 10 radio stations in Louisiana,[1] (ii) a Petition to Deny timely filed on May 1, 1989, by the Louisiana State Conference of Branches of the National Association for the Advancement of Colored People (NAACP), various local NAACP branches and the National Black Media Coalition (hereafter "NAACP/NBMC") against the renewal applications for these radio stations; (iii) oppositions from the licensees; and (iv) the licensees' responses to staff letters of inquiry. NAACP/NBMC allege that the above-captioned stations violated the Commission's equal employment opportunity (EEO) Rule and policies. NAACP/NBMC request that the Commission designate the renewal applications of WFPR(AM)/WHMD(FM), Hammond, Louisiana, for hearing and deny the applications. For the other licensees, NAACP/NBMC request that the Commission investigate the stations' employment practices. If the investigations reveal evidence that requires such action, NAACP/NBMC request that the Commission designate the renewal applications for hearing and deny the applications.[2] With respect to the renewal applications of KRMD(AM)/KRMD-FM, the Commission also received a Petition to Deny from the Louisiana Consumers League (LCL). The LCL Petition raises EEO concerns similar to those of NAACP/NBMC and also raises objections to non-EEO matters related to the licensee's programming decisions. The licensee of KRMD(AM)/KRMD-FM filed an Opposition to the Petition and LCL filed a Reply.

II. BACKGROUND

2. In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. Section 309(d)(1); *Astroline Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Application of Dubuque T.V. Limited Partnership and Sage Broadcasting Corporation of Dubuque, Iowa for Assignment of Television License for KDUB - TV, Dubuque, Iowa*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

3. Filed with the petition to deny were declarations under penalty of perjury from presidents of the following local NAACP branches in Louisiana: the Jenerette Branch and the New Iberia Branch concerning KACY(AM)/KSMB(FM), Lafayette, Louisiana, and WYNK(AM)/WYNK-FM, Baton Rouge, Louisiana; the Baton Rouge Branch concerning WYNK(AM)/WYNK-FM; the Lafayette Branch concerning KACY(AM)/KSMB(FM); and the Shreveport Branch concerning KRMD(AM)/KRMD-FM of Shreveport, Louisiana. We find that the above declarations meet the requirements for establishing standing for the designated branches and for the Louisiana State Conference of Branches of the NAACP regarding the six stations listed. *See American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987). We find, therefore, that the challenge filed by the Louisiana State Conference of Branches of the NAACP constitutes a valid petition to deny against the six listed stations.

4. The petition did not include statements from NAACP members concerning WFPR(AM)/WHMD(FM), Hammond, Louisiana, WCKW(AM), Garyville, Louisiana, and WCKW-FM, LaPlace, Louisiana. Accordingly, we find that the petition to deny filed by the NAACP against these stations is insufficient to establish standing and the petitioner will be considered an informal objector in accordance with 47 C.F.R. Section 73.3584(b).

5. The petition contained a statement under penalty of perjury from the chairman of the NBMC, Pluria W. Marshall, a resident of the Washington, D.C. area. However, the Commission has held previously that the statement of a person who does not claim to be a listener of the challenged station nor a resident of its service area does not satisfy the standing requirements of the Act. *See Applications of Certain Broadcast Stations Serving Communities in the States of Michigan and Ohio*, 3 FCC Rcd 6944 (1988); *see also Application of KDEN Broadcasting Co. for Renewal of License of Station KDEN, Denver, Colorado*, 55 Rad.Reg. 2d (P&F) 1311, 1311-1312 (1984). Accordingly, we hold that the NBMC lacks standing to petition the above-listed Louisiana stations and we will treat its petition as an informal objection.

6. Similarly, we conclude that the LCL has failed to establish itself as a party in interest with respect to KRMD(AM)/KRMD-FM. LCL submits a sworn statement of its Executive Director (who does not allege residency within the stations' service area) stating that LCL is a statewide consumer organization and that some of its dues paying members reside in the stations' service area. However, LCL does not provide an affidavit from any local resident, as is required for an organization seeking to establish standing as a party in interest. *See Standing of a Party to Petition to Deny*, 82 FCC 2d 89, 98 (1980).[3] Therefore, we will treat LCL's petition as an informal objection. *See* 47 C.F.R. Section 73.3587.

III. PLEADINGS

7. NAACP/NBMC derived their factual allegations from the licensees' EEO programs and annual employment reports. Review of the licensees' EEO records led us to conclude that NAACP/NBMC presented a *prima facie* case demonstrating that, as to all ten stations, unconditional grant of the renewal applications would have been inconsistent with the public interest. Section 309(d)(1) of the Communications Act, 47 U.S.C. Sec. 309(d)(1). *Astroline, supra.*[4] Further inquiry was, therefore, necessary. *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont*); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*).

8. Review of NAACP/NBMC's EEO allegations, LCL's EEO and non-EEO allegations, as well as each licensee's renewal applications, oppositions and inquiry responses leads us to conclude that there are no substantial and material questions of fact warranting designation for hearing. In addition, we find no evidence that any licensee engaged in discrimination. Thus, grant of each application will serve the public interest. 47 U.S.C. Sec. 309(d)(2). *Astroline, supra.* Accordingly, we will grant the renewals for WFPR(AM)/WHMD(FM), WYNK(AM)/WYNK-FM and WCKW(AM)/WCKW-FM unconditionally. However, renewal for the remaining stations will be granted with appropriate sanctions and/or remedies. Our analysis follows.

IV. DISCUSSION

9. Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Sections 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080 (b), 73.2080 (c).

10. When a renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), *petition for reconsideration pending*; *see also* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters). *See e.g., Beaumont, supra*; *Bilingual, supra.*

WFPR(AM)/WHMD(FM), Hammond

11. A review of the licensee's 1989 EEO Program Report, opposition and response to our letter of inquiry reveals that the licensee had 20 overall and 18 upper-level full-time hiring opportunities from February 5, 1986, until February 28, 1989. Eight of the licensee's 28 general recruitment sources made the following minority referrals: two newspapers (6), *Radio & Records* (3), a personnel agency (3), Louisiana Department of Employment Security (4), the licensee's employees (2), WKG-TV broadcast school (1), and radio ads (1). The balance produced no minority referrals. The minority-specific sources contacted for the above positions and minority referrals received are: five colleges (2), 15 Black churches and community leaders (1), National Association of Broadcasters Minority Employment Clearinghouse (0), National Council of Negro Women (0) and a Black local newspaper (0). Station records indicate that the licensee contacted minority-specific sources for all 20 positions and had a total of 33 minority referrals from general and minority sources. The licensee indicated that it interviewed 180 applicants for the 20 positions, 29 of whom were minorities (16.1%) (19 of the 23 referrals were interviewed plus 10 additional minorities for whom no specific recruitment sources were listed). The licensee interviewed minorities for 15 of the 20 positions (75.0%). Three of the 20 hires were Blacks (15.0%) hired for upper-level positions (16.7% of 18 upper-level hires).[5] During the license term, four Black full-time employees in upper-level positions departed the stations.[6]

12. NAACP/NBMC assert that the station's EEO efforts throughout the license term were inadequate. They complain that the station's record of employing few minorities during its license term in a market that is 25.2% minority (23.6% Black) is evidence of inadequate self-assessment or a ceiling on minority employment. Because the current licensee owned the stations throughout the previous license term (1979-82) during which it received reporting conditions, NAACP/NBMC request that the Commission hold a hearing concerning the license renewal applications. While noting that the reporting conditions were not in effect after 1982, NAACP/NBMC describe the licensee as a recidivist. They also criticize the licensee for allegedly failing to implement its 1982 EEO program, noting that the licensee listed only three minority-specific sources in its 1989 program though it listed 47 sources overall in its 1982 program.

13. In opposition, the licensee asserts that the NAACP/NBMC's criticism of the licensee's record is unjustified, particularly in regard to efforts and self-assessment. The licensee's records indicate that it held nine meetings between January 14, 1986, and January 3, 1989, to evaluate and revise its EEO program. The licensee denies that it has ever discriminated and reports that the stations have no record of discrimination complaints. Noting that it has hired few minorities, the licensee asserts that the local economy has been depressed for much of the license term and Blacks in the area have been attracted to higher paying jobs available in other fields.

14. The licensee submits declarations made under penalty of perjury from eight Black local residents who state that the licensee contacts them and actively recruits minorities for all positions and serves the interests of the Black community. The declarants include local NAACP officials who urge that the Commission renew the stations' licenses. The NAACP national office asserts, how-

ever, that the local leaders lack the authority to speak for the NAACP national organization regarding the licensee because their views conflict with those of the national organization in the instant case.

15. In view of the licensee's EEO program activities noted in paragraph 11 and the matters noted at paragraphs 12-14, *supra*, we believe that it engages in adequate efforts to recruit and hire minorities and adequate self-assessment of those efforts. We find that unconditional renewal of the licenses is warranted.

WYNK(AM)/WYNK-FM, Baton Rouge

16. A review of the licensee's 1989 EEO Program Report, opposition and response to our letter of inquiry revealed that the licensee had seven overall and six upper-level full-time hiring opportunities from April 13, 1987, through January 13, 1989.[7] The general recruitment sources contacted by the licensee and resulting minority referrals are: two newspapers (2), Louisiana Association of Broadcasters (2), employee referrals (1), *Radio & Records*, Louisiana State University (2), WKG-TV broadcasting school (3), a placement service, Media Job Line, American Women in Radio & TV, *Broadcasting* magazine, National Association of Broadcasters Employment Clearinghouse, Louisiana Department of Employment Security Job Placement Service and walk-ins (5). The minority-specific sources contacted for the above positions and minority referrals are: Southern University (3) and NAACP (1). The licensee contacted minority-specific sources for all openings. The licensee interviewed 45 applicants for the seven positions, of whom seven (15.6%) were minorities. The licensee hired no minorities among its seven hires although it offered an upper-level position to a Black applicant who rejected the offer and accepted employment at another station.[8] Also, the licensee promoted an American Indian employee from a lower-level position to upper-level and promoted an Hispanic employee to full-time announcer after first hiring him to work part-time.

17. NAACP/NBMC assert that the current licensee failed to contact all of the sources listed in the 1982 renewal application filed by the previous licensee and failed to obtain a significant number of minority referrals in recruiting for its positions. NAACP/NBMC note that the licensee hired no minorities since acquiring the stations in February 1987. Noting also that the previous licensee's reports filed pursuant to reporting conditions imposed during the 1982-89 license term were submitted prior to acquisition by the current licensee, NAACP/NBMC assert, nevertheless, that the conditions should have served as notice to the current licensee of a deficient affirmative action record. Because of this notice, NAACP/NBMC assert that the Commission should apply a stricter review to the current licensee.

18. The licensee acknowledges that it did not use all of the sources listed in the previous licensee's renewal application or its own assignment application but notes that it substituted new sources. The licensee notes that it contacted minority-specific sources for every position and obtained 19 minority referrals from the 16 total sources contacted for the seven full-time positions. The licensee asserts that it assessed its EEO program regularly and added sources on two occasions. To aid in assessment, the licensee notes that it maintains gender and race information on interviewees, dates of recruitment and hires, sources of interviewees and data on promotions. In addition, the licensee trains its employees for career advancement and promoted two minorities out of the four promotions it made during the license term.

19. The licensee has used minority-specific sources for every opening, received minority referrals and interviewed minorities. We believe that these efforts support a finding that the licensee has implemented an effective EEO program and complies with our EEO Rule and policies. The licensee acquired its licenses slightly less than 24 months prior to submission of the renewal applications and had only seven full-time hiring opportunities. Accordingly, we will renew the licenses of WYNK(AM)/WYNK-FM without condition.

WCKW(AM), Garyville, and WCKW-FM, LaPlace

20. A review of the licensee's 1989 EEO Program Report, opposition and response to our letter of inquiry reveals that the licensee had 25 overall and 24 upper-level full-time hiring opportunities from April 1, 1986, through November 30, 1988. The general recruitment sources contacted by the licensee include: three newspapers, *Radio & Records*, University of New Orleans, WKG-TV broadcasting school, a Catholic charity group, a telephone company, a hospital, a clinic, the Louisiana Job Placement Service, on-air ads, employee referrals, walk-ins and an internship program that includes students from three schools and non-students. A walk-in and an employee were the sources of the licensee's two minority referrals for full-time positions.[9] The minority-specific sources contacted for the above positions are as follows: six Black churches and two Black community leaders. The licensee contacted minority sources for all positions. The licensee's records on the race of its applicants are incomplete but it implemented a system in 1989 to track and retain information on the race and sex of each applicant, referral sources contacted and referral source of each applicant. The licensee interviewed 38 applicants for the 19 positions for which it kept interview records. Of the interviewees, seven (18.4%) were minorities. The licensee's response to our inquiry revealed that minority hires resulted from the employee referral and walk-in listed above. Of the station's 25 full-time hires, two (8.0%) were minorities -- both Blacks hired for upper-level positions (8.3% of 24 upper-level hires).[10]

21. NAACP/NBMC assert that the licensee failed to use minority-specific recruitment sources and hired very few minorities during the license term despite the fact that the stations doubled in size.

22. In defense of its record, the licensee notes that it contacted eight minority-specific sources and 14 general sources as well as evaluated its minority recruitment efforts and increased its sources. As of the last month of the license term, the licensee uses 12 minority sources and 17 general sources. The licensee submits declarations under penalty of perjury from four community leaders (three of whom are Black) who state that the licensee recruits minorities and contacts them for referrals, that they have referred minority applicants to the licensee and that the licensee does not discriminate in employment based on race. Additionally, the licensee indicates that its intern program at local schools includes teaching a broadcasting course at a local high school, allowing Black and other students to do an on-air news program and hiring Black students as interns. Through the intern program, which also trains adults, the licensee employed six Black interns in upper-level positions at various times from 1986

through 1988. In addition to interns, the licensee trains its employees for career advancement, such as a Black salesman who became an announcer and program director through such training.

23. The licensee attributes its limited success in attracting minorities to the depressed local economy, large local companies offering higher salaries than broadcasting, the stations' remote location and the stations' financial problems during the license term. Moreover, the licensee notes that it offered employment to Black applicants during the period under review who declined the job offers.[11] The licensee maintains that moving the new studio location closer to New Orleans on August 1, 1990 will significantly aid the stations in attracting more minorities. Lastly, the licensee indicates that it maintained and increased minority employment at the stations during the license term.

24. In evaluating the foregoing, we note that the licensee contacted minority-specific sources for all vacancies, tracked the race of 76% of its interviewees, interviewed minorities, assessed its EEO efforts, hired two minorities for upper-level positions and offered upper-level positions to three other minorities. Despite these efforts, the licensee failed to maintain complete records of its applicants to help in its self-assessment. Better records and self-assessment are needed because the licensee's general and minority sources, though significant in number, were unproductive except for station employees. Accordingly, we will grant the licensee's renewal applications but admonish the licensee to improve its record-keeping and recruiting efforts.

KACY(AM)/KSMB(FM), Lafayette

25. A review of the licensee's 1989 EEO Program Report, response to the petition to deny and response to our letter of inquiry reveals that the licensee had 11 overall and 10 upper-level full-time hiring opportunities from November 10, 1987,[12] through December 31, 1988.[13] The licensee used general recruitment sources from which it received minority referrals as follows: WKG-TV broadcasting school (1), *The Daily Advertiser* ads (2), employee referrals (3), a university (1), the Lafayette School Board, Junior League of Lafayette, Lafayette Regional Vocational and Technical and American Women in Radio & TV. The licensee did not contact any minority-specific sources although it reports that the schools it contacted have significant minority enrollments. It is unclear from the inquiry response whether the licensee maintains records on all applicants and interviewees during the period under review. The licensee's interview records indicate that six minorities were interviewed for the 11 positions it filled. The station hired no minorities during the license term but offered full-time upper-level positions to three minorities who rejected the job offers.[14] The licensee twice offered but received rejections from one of its Black applicants for a sales position. Lastly, the licensee asserts that it seeks minorities through a variety of sources for all vacancies. The licensee also states that it seeks new sources to reach potential minority applicants for positions.

26. Although the licensee has owned the stations for a brief time, there is a lack of complete record-keeping regarding recruitment and interviewees, and a lack of information indicating active self-assessment. The licensee has hired only 11 employees full-time, has made four offers to minorities for full-time upper-level positions, and employs minorities, albeit primarily in lower-level positions. We find that the record of the licensee is similar to the record in those cases in which we have granted renewals subject to reporting conditions. *See, e.g., Applications of Certain Broadcast Stations Serving Communities in the Sarasota, Florida Area and Other Florida Communities*, 5 FCC Rcd 5683 (1990); *Applications of Certain Broadcast Stations Serving Communities in the Miami, Florida Area*, 5 FCC Rcd 4893 (1990); *Letter to Harry R. Shriver, The Baltimore Radio Show, Inc.*, 3 FCC Rcd 5913 (1988) (WFBR(AM), Baltimore, Maryland). Therefore, we will renew KACY(AM)/KSMB(FM)'s licenses subject to reporting conditions in order to monitor its future affirmative action efforts and self-assessment.

KRMD(AM)/KRMD-FM, Shreveport

27. As noted earlier, there are two submissions challenging the license renewal applications for KRMD(AM)/KRMD-FM. NAACP/NBMC question the stations' compliance with our EEO requirements. In a separate pleading, the Louisiana Consumers League (LCL) raises both EEO and programming issues.

28. *Programming Issues.* LCL's programming objection to the license renewal of KRMD(AM)/KRMD-FM arises out of several May 1989 programming decisions by the licensee. On May 9, 1989, newspaper columnist and author Remar Sutton appeared as a guest on a live talk show simulcast over both stations. Mr. Sutton, who was in town to conduct a seminar for members of the Barksdale Federal Credit Union (BFCU) entitled, "Buy A Car On Your Terms," warned listeners not to trust car dealers or their negotiating methods. LCL alleges that during Mr. Sutton's appearance, local car dealers called the station and threatened to withdraw their advertising support. It submits affidavits from Mr. Sutton and others present in the studio who allege that the licensee's vice president and general manager thereafter cut the interview short and canceled a taped interview with Mr. Sutton that was scheduled to air later that week. Several hours after Mr. Sutton's appearance on the station, the licensee allegedly aired editorials critical of Mr. Sutton and supportive of local car dealerships. LCL alleges that the licensee violated its obligation as a public trustee by basing its programming decisions on its own economic interests rather than on the public interest. LCL also argues that the stations' editorials violated the Commission's personal attack rule, 47 C.F.R. Section 73.1920. In particular, LCL alleges as follows: "KRMD's General Manager read the editorial, which referred to Mr. Sutton as 'an individual who conducts business in a dishonest or unethical manner.' Mr. Dickerson also disparaged Mr. Sutton's motives and said that Mr. Sutton 'unscrupulously used' KRMD."

29. In response, the licensee submits transcripts of the broadcasts at issue and acknowledges its early termination of the Sutton interview and its airing of the editorials.[15] However, the licensee maintains that it did not violate the public trust or any Commission rules. With respect to the termination of Mr. Sutton's appearance, the licensee states that its actions were well within its discretion and justified because Mr. Sutton's remarks were potentially defamatory, could have subjected the station to liability, and represented a violation of Mr. Sutton's agreement not to be inflammatory or to upset the stations' advertisers. The licensee also maintains that the editorials in question were not of a nature that would trigger any obligations under the personal attack rule.

30. Broadcasters are not common carriers, and therefore are not obliged to accept all programming offered by members of the public. 47 U.S.C. Section 153(h); *Columbia Broadcasting v. Democratic Committee*, 412 U.S. 94, 116 (1972). In view of broadcasters' First Amendment rights to free speech and the Communication Act's express prohibition of censorship, the Commission has very limited authority to interfere with a licensee's discretion to select, reject, or change its mind about particular program material. *See* 47 U.S.C. Section 326; *Citizens Communications Center*, 25 FCC 2d 705 (1970); *Tri-State Broadcasting Co., Inc.*, 59 FCC 2d 1240, 1244 (1976). The Commission's review of programming during the license renewal process generally focuses on whether the licensee has made a reasonable effort in its overall programming to deal with the problems of its community through issue-responsive programming. *Deregulation of Radio*, 84 FCC 2d 968, 982 (1981), *recon. granted in part and denied in part* 87 FCC 2d 797, *aff'd in relevant part and remanded in part sub nom. Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983).

31. The licensee's broad discretion over programming matters is, of course, limited by the broadcaster's obligation to operate its station in the public interest. We have long held that the interest of the listening public is paramount to the private interests of the licensee. *See KFKB Broadcasting Association v. Federal Radio Commission*, 47 F.2d 670, 671 (1931). That is not to say that a commercial licensee cannot profit from its station or that all actions which further a licensee's private interest necessarily violate the public trust. Rather, it recognizes that Commission intervention is warranted if a licensee's private interest and the public interest are incompatible, *i.e* if the private interest poses "a substantial risk of serious harm to listeners."[16] *See Policy Statement and Order*, Elimination of Unnecessary Broadcast Regulation, MM Docket No. 83-842, 57 RR2d 913, 921 (1985), *aff'd sub nom., Telecommunications Research Action Center v. FCC*, 800 F.2d 1181 (D.C. Cir. 1986).

32. Upon our examination of the record of this case, and assuming *arguendo* the facts alleged by LCL to be true, we cannot conclude that the licensee's alleged actions posed any substantial risk of serious harm to listeners. LCL attempts to equate the facts of the current case with those involving alleged falsification, distortion, slanting and/or suppression of news programming.[17] News distortion is "a most heinous act against the public interest" because "there is no act more harmful to the public's ability to handle its affairs." *Hunger in America*, 20 FCC 2d 143, 151 (1969). These same considerations do not apply to the non-news programming at issue in the present case. Furthermore, LCL's allegations, which focus on a single programming decision, do not indicate that KRMD(AM)/KRMD-FM's overall programming reflects any abuse of licensee discretion or failed to respond to community problems. We find that the licensee's decision did not fall outside the broad discretion afforded to licensees on programming matters. Thus, LCL's "private interest" allegations do not raise substantial and material questions of fact as to the licensee's ability to operate in the public interest.

33. Next, we turn to LCL's personal attack allegations, which are supported by an affidavit from Mr. Sutton. The personal attack rule, 47 C.F.R. Section 73.1920, provides an opportunity for response to broadcast attacks on the honesty, character, or integrity of an identifiable person or group. Such an attack, however, must be made during the presentation of views on controversial issues of public importance. Mr. Sutton requested but was denied an opportunity to respond to editorials which he believed to attack his honesty and integrity during discussion of an issue that LCL identifies as "automobile purchasing practices."[18]

34. We find that petitioner has failed to establish that the statements in the editorials constitute a personal attack. First, we agree with the licensee that the editorial references to its not endorsing or recommending "any organization or individual who conducts business in a dishonest or unethical manner" appear to be comments directed at area car dealers, not at Sutton. Moreover, we further agree with the licensee that later editorial references to "measur[ing] ethics" and the stations' being "unscrupulously used" (see note 15, *supra)* arose in the context of a discussion of the manner in which Sutton obtained access to broadcast airtime, not a discussion of the underlying allegedly controversial issue identified by petitioner, i.e., "automobile purchasing practices." Thus, the licensee's failure to treat the broadcasts as a personal attack was not unreasonable. As a further matter, although the existence of sales practices in the car industry may be a topic of interest, the petitioner has provided no evidence that the issue is controversial in the community. Mr. Sutton and the BFCU have accused various car dealerships of acting deceptively. However, those accusations do not, in themselves, make the issue of deceptive sales practices controversial. Finally, the petitioner's argument that because BFCU has 16,000 members the issue is automatically controversial is also without merit. The petitioner does not show that there is controversy among the members regarding the existence of such practices. Again, it is only their claims against various car dealers that forms a basis for the alleged controversy, and that is a private, not public, matter. In view of the foregoing, we cannot find unreasonable the licensee's decision that the topic of discussion during Mr. Sutton's appearance did not rise to the level of was not a controversial issue of public importance.

35. *EEO Issues*. A review of the licensee's 1989 EEO Program Report, opposition and response to our letter of inquiry reveals that the licensee had 34 overall and 33 upper-level full-time hiring opportunities from January 1986, through June 1, 1989.[19] The general recruitment sources contacted by the licensee are: two newspapers, three colleges, a business school, the YMCA, a vocational-technical school, Business & Professional Women, Executive Women International and on-air ads on the licensee's stations. The only minority-specific source the licensee contacted for the above positions was the NAACP. The licensee's records do not indicate that it contacted minority sources, if any, for particular positions. The only record of minority referrals are the three minorities referred by two newspapers during the renewal year. The licensee is otherwise unaware of how many minority applicants, referrals or interviewees it had for the above openings. The licensee asserts that minorities applied to the stations, but not for specific positions and in numbers unknown to the licensee. The licensee hired no minorities among its 34 hires.[20]

36. NAACP/NBMC criticize the licensee for failing to garner significant numbers of minority referrals and failing to take specific steps to remedy this deficiency. NAACP/NBMC note that the licensee hired few or no

minorities since acquiring the stations. Noting also that a previous licensee's reporting conditions during the 1976-79 license term did not apply to the current licensee, NAACP/NBMC assert nevertheless that the conditions of two terms ago should have served as notice to the current licensee of a deficient affirmative action record. Because of this notice, NAACP/NBMC assert that the Commission should apply a stricter review to the current licensee. Also, NAACP/NBMC assert that there is a discrepancy in the 1989 renewal application because no minorities are listed in upper-level positions in 1988 and none were hired but one is referenced in the 1989 application.

37. When the licensee acquired the stations, it asserts that it faced financial problems and reduced its staff to save funds. Annual Employment Reports from 1985 (the last report filed by the previous licensee) and 1986 (filed by the current licensee) indicate a decline in the stations' workforce from 33 employees overall to 25 and from 32 to 24 upper-level. Regarding minorities, the 1985 report indicates that the stations employed five Blacks, four of whom were in upper-level positions. Two of these employees left the stations before the licensee acquired the stations. The licensee later lost one Black employee who left to attend college. Lastly, the licensee explains that, inasmuch as the minority referred to in the 1989 renewal application was a promotion, there is no discrepancy among its reports. The licensee, however, acknowledges that it did not have an EEO program when it acquired the stations and did not assess its efforts until August 1988 -- six months prior to submitting the renewal applications. In 1988, the licensee created the position of EEO Director and promoted a Black clerical employee to the new position. She then created a program and started expanding recruitment sources. The licensee notes that it offers employee training or pays for outside training. Moreover, the licensee asserts that, even though it has almost no records of EEO efforts, the fact that it has always employed minorities demonstrates that it "has been engaging in minority outreach efforts and that those efforts have been successful."

38. We reject the licensee's argument that the Commission should excuse the licensee's failure to implement an EEO program because of alleged financial reasons, especially when the licensee hired 34 new full-time employees during the license term. Financial concerns also do not excuse the licensee's failure to assess its efforts until almost three years after acquiring the licenses. The mere presence of two or three Blacks on the stations' staffs of 25, 26 and 22 employees from 1986-89, respectively, also does not excuse the licensee's lack of a program and lack of self-assessment. We pointedly reject the argument that the mere presence of a small number of minority employees who are holdovers from a previous licensee proves that the current licensee is engaged in successful minority outreach efforts. In fact, the presence of such employees offers no evidence whatsoever of affirmative action efforts by the current licensee. The licensee's virtual absence of recruitment records demonstrates its lack of commitment to or interest in EEO efforts or self-assessment until the end of the license term. Such records are essential for adequate self-assessment.

39. After reviewing the record of the licensee of KRMD(AM)/KRMD-FM, we find it to be similar to that of the licensee of WTHZ-FM, Tallahassee, Florida. *See Letter to Howard B. Dolgoff, Station WTHZ-FM, Tallahassee, Florida*, 5 FCC Rcd 7695 (1990). Like the licensee of KRMD(AM)/KRMD-FM, the licensee of WTHZ-FM obtained its station approximately three years prior to the expiration of its license term. The licensee of WTHZ-FM failed to track the race or gender of its applicants or interviewees, kept inadequate records on other aspects of recruitment and had inadequate self-assessment. From 1986-1988, it employed 14, 14 and 12 employees, respectively. It used only one general recruitment source until the end of its term, when it added minority-specific and other sources. It obtained two minority referrals during the renewal year. It hired 27 employees full-time during the term, including one minority hired for an upper-level position. The labor force of the Tallahassee MSA is 27.6% minority and 25.7% Black. For the deficiencies outlined, the licensee received reporting conditions, renewal for less than a full term and a Notice of Apparent Liability for $18,000. The licensee of KRMD(AM)/KRMD-FM employed more employees and had more hiring opportunities than the licensee of WTHZ-FM. Despite these factors, it hired no minorities. Although WTHZ-FM's only minority employee was the one it hired, KRMD(AM)/ KRMD-FM's only minority employees were hired by its previous licensee. Accordingly, we find the EEO record of KRMD(AM)/KRMD-FM to be similar to but more egregious than that of WTHZ-FM. Therefore, we will renew the licenses for less than a full term, impose reporting conditions and issue a Notice of Apparent Liability for $20,000 for the licensee's repeated violation of the Commission's EEO Rule, 47 C.F.R. Section 73.2080 (b) and (c)(1), (2), (3) and (5).

V. CONCLUSION

40. After considering the evidence and arguments submitted by NAACP/NBMC, LCL and all licensees in the instant case, we find that no hearings are warranted and the records of the licensees support the granting of all of their renewal applications. Regarding the licensees of WFPR(AM)/WHMD(FM), WYNK(AM)/WYNK-FM and WCKW(AM)/WCKW-FM, unconditional grant of their renewal applications is warranted. Because of concerns about future affirmative action efforts, however, reporting conditions are warranted for the two other licensees. Finally, regarding the licensee of KRMD(AM)/KRMD-FM, a Notice of Apparent Liability for $20,000 and renewal for less than a full term are warranted in addition to reporting conditions because of repeated violations of the Commission's EEO Rule.

VI. ORDERING CLAUSES

41. Accordingly, IT IS ORDERED, that the informal objection filed by the NAACP and NBMC against Stations WFPR(AM)/WHMD(FM) IS DENIED.

42. IT IS FURTHER ORDERED that the petition to deny filed by the NAACP against Stations WYNK(AM)/WYNK-FM, KACY(AM)/KSMB(FM) and KRMD(AM)/KRMD-FM, the informal objection filed by the NAACP against Stations WCKW(AM)/WCKW-FM, and the informal objection filed by the NBMC against the listed eight stations ARE GRANTED to the extent indicated herein and ARE DENIED in all other respects.

43. IT IS FURTHER ORDERED that the informal objection filed by the LCL against stations KRMD(AM)/KRMD-FM IS DENIED.

44. IT IS FURTHER ORDERED that the Motion To Accept Late-Filed Petition to Deny filed by the LCL IS DISMISSED AS MOOT.

45. IT IS FURTHER ORDERED, that the license renewal applications filed by Airweb, Inc. for Stations WFPR(AM)/WHMD(FM), filed by Narragansett Radio, L.P. for Stations WYNK(AM)/WYNK-FM and filed by 222 Corporation for Stations WCKW(AM)/WCKW-FM ARE GRANTED.

46. IT IS FURTHER ORDERED, that the license renewal applications filed by Media Properties for Stations KACY(AM)/KSMB(FM) ARE GRANTED subject to the EEO reporting conditions specified herein.

47. IT IS FURTHER ORDERED, that the license renewal applications filed by AmCom of Louisiana, Inc. for Stations KRMD(AM)/KRMD-FM ARE GRANTED FOR A SHORT TERM ending June 1, 1994, subject to the reporting conditions specified herein and, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $20,000.

48. IT IS FURTHER ORDERED, that the licensees of Stations KACY(AM)/KSMB(FM) and KRMD(AM)/KRMD-FM file an original and one copy of the following information on February 1, 1993, and February 1, 1994, and that the licensee of Stations KACY(AM)/KSMB(FM) also file an original and one copy of the following information on February 1, 1995:

(a) For each report, a list of all job vacancies during the twelve months preceding the respective reporting dates, indicating the job title and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[21]

(b) a list of employees as of the January 1, 1993, payroll period for the first report and as of the January 1, 1994, and the January 1, 1995, payroll periods for the second and third reports, by job title, indicating part-time or full-time status (ranked from the highest paid classification), date of hire, sex and race or national origin;

(c) details concerning the station's efforts to recruit minorities for each position filled during the period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

49. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order and Notice of Apparent Liability to all parties.

50. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch. Should the parties have any questions regarding this action, they may telephone the Mass Media Bureau's EEO Branch at 202-632-7069. Regarding the forfeiture proceedings for KRMD(AM)/KRMD-FM, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order and Notice of Apparent Liability. Any comments relating to its ability to pay should include those financial letters set forth in the noted attachment.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] These applicants are: Airweb, Inc., licensee of WFPR(AM)/WHMD(FM), Hammond, Louisiana (file nos. BR-890131WZ and BRH-890131WY); Narragansett Radio, L.P., licensee of WYNK(AM)/WYNK-FM, Baton Rouge, Louisiana (file nos. BR-890131UC and BRH-890131UG); 222 Corporation, licensee of WCKW(AM), Garyville, Louisiana (file no. BRH-890112UF) and WCKW-FM, LaPlace, Louisiana (file no. BR-890112UG); Media Properties, licensee of KACY(AM)/KSMB(FM), Lafayette, Louisiana (file nos. BR-890201VB and BRH-890201VA); and AmCom of Louisiana, Inc., licensee of KRMD(AM)/KRMD-FM, Shreveport, Louisiana (file nos. BR-890201WT and BRH-890201WU). NAACP/NBMC referred to KACY(AM)/KSMB(FM) as KXKW-AM/FM in their petition. At the time the licensee filed for renewal, the call sign for the AM station was KXKW(AM) but has since changed to KACY(AM). The call sign for the FM station has been KSMB(FM) throughout its license term.

[2] With respect to the challenge against these Louisiana stations, NAACP/NBMC requested that the Commission investigate the stations' EEO performances in order to determine whether the licensees violated the Commission's EEO Rule. Moreover, they requested that, "if the evidence thereby elicited [by the investigations] so requires, the Commission should designate the applications . . . for hearing and thereafter deny the applications." Standing alone, a request for an investigation is not a petition to deny or informal objection against a license renewal. However, NAACP/NBMC included the Louisiana stations in a larger petition covering stations in several states in which they request in the first paragraph of the petition that the Commission designate all the "applications for evidentiary hearings and, based on the evidence expected to be adduced at these hearings, to deny the applications." Therefore, we will treat the challenge to the Louisiana stations as indicated in paragraphs 3, 4, 5 and 6 of this *Order*.

[3] LCL's statement that it would provide names and addresses of its members, if required to do so, is no substitute for the required affidavit from a member. Having determined that LCL has not established itself as a party in interest, we need not consider whether LCL's submission is entitled to be considered as a Petition to Deny despite its late filing. Accordingly, LCL's "Motion to Accept Late-Filed Petition to Deny" shall be dismissed as moot.

[4] The licensees were not challenged regarding their recruitment of women. Nonetheless, as is our practice in all cases, we reviewed each licensee's EEO efforts in this respect and found them sufficient.

[5] The labor force of Tangipahoa County, Louisiana is 40.4% female and 25.2% minority, with Blacks comprising 23.6% of the total labor force. In 1989, the licensee employed 17 employees overall (15 upper-level), including two (11.8%) Blacks, one (6.7%) of whom was employed in an upper-level position. In 1988, the licensee employed 16 employees overall (13 upper-level), including two (12.5%) Blacks, one (7.7%) of whom was an upper-level employee. In 1987, the licensee employed 17 employees overall (15 upper-level), including one (5.9%) Black employee in a lower-level position. In 1986, the licensee employed 22 employees overall (19 upper-level), including two (9.1%) Blacks, one (5.3%) of whom was in an upper-level position. In 1985, the licensee had 23 overall employees (20 upper-level), including three (13.0%) Blacks, two (10.0%) of whom were upper-level employees. For 1984, the licensee had 21 overall employees (18 upper-level), including four (19.0%) Blacks overall and two Blacks (11.1%) in upper-level positions. In 1983 and 1982, the licensee had 18 overall employees (15 upper-level), including four (22.2%) Blacks, two (13.3%) of whom were upper-level employees.

[6] The licensee reports that two of its Black employees left the stations to obtain higher paying jobs, one resigned to resolve family requirements that conflicted with station employment and one was terminated involuntarily. The licensee later rehired to a full-time position the employee who had conflicting family requirements.

[7] The licensee acquired the stations on February 24, 1987.

[8] The labor force of the Baton Rouge, Louisiana MSA is made up of 41.0% women and 26.4% minorities (24.1% Black). In 1989, the licensee employed 28 employees overall (23 upper-level), including five (17.9%) minorities -- two (7.1%) Blacks in lower-level positions, two (7.1%) Hispanics and one (3.6%) American Indian, all (13.0%) in upper-level positions. In 1988, the licensee had 24 employees overall (20 upper-level), of whom four (16.7%) were minorities, two (8.3%) Blacks in lower-level positions, one (4.2%) Hispanic and one American Indian, both (10.0%) in upper-level positions. In 1987, the licensee had 25 employees overall (20 upper-level), of whom four (16.0%) were minorities, two (8.0%) Blacks in lower-level positions, one (4.0%) Hispanic and one American Indian. The Hispanic employee was the only minority in an upper-level position (5.0%). The 1987 Annual Employment Report covered a two-week pay period (March 1 - 15) which began four days after the licensee acquired the stations.

[9] The licensee's records indicate that it received 18 minority referrals for part-time positions. The records also indicate that the licensee hired 34 applicants part-time, of whom 14 (41.2%) were Black (13 for upper-level positions, mainly announcers).

[10] The labor force of the New Orleans, Louisiana MSA is made up of 41.2% women, and 32.5% minorities (27.3% Black). WCKW(AM)/WCKW-FM, despite different cities of license, share the same studio and have simulcasted over the years except for the period 1981-85. In 1989, the licensee employed 22 employees overall (19 upper-level), including two (9.1%) minorities -- one Black (4.5%) and one Hispanic, both in upper-level positions (10.5% of upper-level employees). In 1988, the licensee had 17 employees overall (15 upper-level), of whom three (17.6%) were minorities, one Black (5.9%) and two (11.8%) Hispanics, all (20.0%) in upper-level positions (6.7% Black, 13.3% Hispanic). In 1987, the licensee had 17 employees overall (15 upper-level), of whom three (17.6%) were minorities, two (11.8%) Blacks and one (5.9%) Hispanic, all (20.0%) in upper-level positions (13.3% Black and 6.7% Hispanic). In 1986, the licensee had 16 employees overall (14 upper-level), of whom two (12.5%) were minorities, one (6.3%) Black and one Hispanic, both (14.3%) upper-level (7.1% Black and 7.1% Hispanic). In 1985, the licensee had 11 employees overall (10 upper-level), of whom one (9.1%) was minority (Hispanic) employed in an upper-level position (10.0%). In 1984, 1983 and 1982, the licensee had eight employees overall (all upper-level in 1984, seven in 1983 and 1982), of whom one (12.5%) was minority (Hispanic) in an upper-level position (12.5% in 1984, 14.3% in 1983 and 1982). The licensee reports that it employed a Black intern full-time from June to December 1984, but that she did not appear on the Annual Employment Report. She departed the station to attend college.

[11] The licensee offered full-time upper-level positions to two Black applicants who rejected the offers and to one Black applicant who accepted an offer but failed to report for work. It also offered a full-time sales position to a Black part-time employee who rejected the offer.

[12] The licensee acquired the stations on September 30, 1987.

[13] By way of background, NBMC/NAACP filed a request to withdraw its Petition to Deny concerning KACY(AM)/KSMB(FM) on June 24, 1989. We accept the withdrawal of the Petition. However, as with all such cases, we have reviewed the record and renewal applications of KACY(AM)/KSMB(FM) *suasponte* and have concluded that sanctions are warranted for the reasons noted herein.

[14] The Lafayette, Louisiana MSA's labor force is 39.7% female and 22.1% minority (19.6% Black and 2.0% Hispanic). In 1989, the licensee had 27 overall employees (23 upper-level), of whom four (14.8%) were minorities, three (11.1%) Blacks in lower-level positions and one (3.7%) Hispanic in an upper-level position (4.3%). In 1988, the licensee had the same number of overall and upper-level employees and the same number of lower-level Black employees. It had no Hispanic employees. The licensee acquired the stations in September, 1987. Prior to the assignment of the licenses, the previous licensee had 28 overall employees (25 upper-level), of whom three (10.7%) were minorities, two (7.1%) Black lower-level employees and one (3.6%) Hispanic upper-level employee (4.0%).

[15] The actual editorial references to dishonest, unethical and unscrupulous conduct are as follows:

> This morning (yesterday) on the K.C. and Kelli show on KRMD, many of you heard from Consumer Advocate Remar Sutton whose appearance in Shreveport is sponsored by Barksdale Federal Credit Union through their agency, Joe Campbell and Company. While on the air today (yesterday), Mr. Sutton used this occasion to verbally assault the Shreveport-Bossier Automobile Dealers. Remar Sutton's remarks indicated that Auto Dealers were untrustworthy and nefarious in dealing with the public. Later today (yesterday) Mr. Sutton apparently spoke to a consumer group and encouraged them to call KRMD and verbally state their support for his seminar.
>
> We want to go on record to our listeners and advertisers that we do not endorse or recommend any organization or individual who conducts business in a dishonest or unethical manner. When we begin to measure ethics in professional or personal lifestyles, we first need to examine intent. KRMD feels that Mr. Sutton's intent to gain access to our airwaves, was not to promote his consumer clinic, but to disparage the area car dealers who are advertisers on our stations. Our stations have been unscrupulously used by a person who will spend 48 hours in our town, and leave us to live with the consequences.

[16] The Commission established the "substantial risk" standard in a 1985 proceeding which eliminated as underbrush, certain rules dealing with conflicts of interest and "improper" use of

broadcast stations to further outside business interests of the licensee. Prior to that time, the Commission's consideration of private interests extended further than today. For example, the Commission once designated for hearing such issues as whether a licensee canceled an advertisement due to economic pressure of sponsors and whether a licensee's failure to play particular records or public service announcements was motivated by its outside business interests. *See E. Boyd Whitney*, 86 FCC 2d 1133 (1981); *Capital Cities Communications, Inc.*, 68 FCC 2d 622, 630 (1978); *Radio Enterprises of Ohio, Inc.*, 38 FCC 2d 1104 (1972); *see also KMPC, Station of the Stars, Inc.*, 14 Fed. Reg. 4831 (August 3, 1949) (programming favoring licensee's own political, social, and economic views). However, as previously noted, these latter policies no longer apply.

[17] *E.g. Michael D. Bramble*, 58 FCC 2d 565, 571-72 (1976) (suppression of news stories adverse to the interests of sponsors); *Gross Telecasting, Inc.*, 92 FCC 2d 204 (1982) (blackout of news coverage of events at sporting club with delinquent advertising bill); *Wyoming Broadcast Co. (WWYO)*, 27 FCC 2d 752 (1971) (delay of news story unfavorable to acquaintance of licensee); *Chronicle Broadcasting Co.*, 16 FCC 2d 882 (1969) (slanting of news to advance parent company's outside business interests). LCL also attempts to equate the licensee's actions with improper delegation of programming authority to third parties. LCL's one-sentence allegation in this regard does not support such a finding. *See generally Trustees of the University of Pennsylvania (WXPN-FM)*, 69 FCC 2d 1394 (1978).

[18] The parties disagree on whether this issue is a controversial issue of public importance. The licensee relies on *Mark Brown (Radio Stations WBZ and WRKO)*, 3 FCC Rcd 792 (1988), in which the Commission found the issue of "consumer ripoffs by automobile dealers" not to be of public importance in Boston, Massachusetts. LCL attempts to prove that Shreveport, unlike Boston, has an ongoing controversy over automobile purchasing practices. In support of this argument, LCL states that BFCU's membership of 16,000 in the Shreveport area represents a substantial element in the community.

[19] The licensee acquired the stations on January 10, 1986.

[20] The labor force of the Shreveport, Louisiana MSA is comprised of 45.0% women and 30.6% minorities (28.6% Black and 1.4% Hispanic). In 1989, the licensee employed 22 employees overall (20 upper-level), including two (9.1%) minorities, both Blacks, one (5.0%) of whom was in an upper-level position. In 1988, the licensee had 26 employees overall (23 upper-level), of whom two (7.7%) were minorities, both Blacks, one (4.4%) of whom was in an upper-level position. In 1987, the licensee had 25 employees overall (24 upper-level), of whom two (8.0%) were minorities, both Blacks, one (4.2) of whom was in an upper-level position. In 1986, the licensee had 25 employees overall (24 upper-level), of whom three (12.0%) were minorities, all Blacks, two (8.3%) of whom were in upper-level positions.

[21] Such a list might start:

(1) News Director: Officials and Managers: Full-time.

3 Applicants:	1 White female	A.W.R.T.
	1 Black male	Urban League
	1 Black female	NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League and NAACP.

Selected: Black male (08/19/91).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Telephone Companies Revisions to Tariff F.C.C. No. 1	Transmittal Nos. 471, 475, and 487
BellSouth Telephone Companies Revisions to Tariff F.C.C. No. 4	Transmittal No. 436
BellSouth Telecommunications Co. Revisions to Tariff F.C.C. No. 1	Transmittal No. 11
NYNEX Telephone Companies Revisions to Tariff F.C.C. No. 1	Transmittal Nos. 57, 62, 68, and 76
Pacific Bell Revisions to Tariff F.C.C. No. 1	Transmittal Nos. 1553, 1559, 1565, and 1567
Nevada Bell Revisions to Tariff F.C.C. No. 1	Transmittal No. 123, 124,125, and 126
Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 68	Transmittal Nos. 2145, 2146, 2154, 2155, 2159, and 2166
US West Communications, Inc. Revisions to Tariff F.C.C. No. 1	Transmittal Nos. 206 and 225
Open Network Architecture Tariffs	

MEMORANDUM OPINION AND ORDER

Adopted: January 31, 1992; Released: January 31, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. In the *Computer III* proceeding,[1] the Commission initiated a process for replacing the structural separation requirements for Bell Operating Companies' (BOCs') enhanced service operations with nonstructural safeguards, including Open Network Architecture (ONA).[2] ONA was designed to unbundle certain services provided by BOCs in order to promote efficient and innovative use of the network by independent enhanced service providers (ESPs) and to prevent discrimination.

2. The Commission concluded that the provision of unbundled basic service "building blocks" would promote the ability of the BOCs' ESP competitors to compete effectively. Hence, the Commission ordered the BOCs to unbundle from their existing feature group access arrangements, the optional and generally software-based features and functions to be called basic service elements (BSEs). These BSEs were distinguished from the underlying switching and transmission services called basic serving arrangements (BSAs). The BOCs described this unbundling in detail in their ONA Plans, which were approved by the "Commission in 1990. [3]

3. In July 1991, the Commission adopted revisions to Part 69 of the Commission's Rules, specifying rate structure and other tariffing requirements to be followed by BOCs when implementing their ONA Plans.[4] The *Part 69 ONA Order* required the BOCs to unbundle their feature group offerings as outlined in their approved ONA plan. In addition, that Order required each BOC to establish one lineside and one trunkside switched BSA. Furthermore, the *Part 69 ONA Order* specified requirements for cost data to be submitted in support of ONA tariffs, including a showing that the unbundled ONA services would be revenue neutral compared to existing access elements.[5] The *Part 69 ONA Order* required the BOCs to file tariffs conforming to the new rules by November 1, 1991.

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[1] Amendments of Section 64.702 of the Commission's Rules and Regulations, Report and Order, CC Docket No. 85-229,104 FCC 2d 958 (1986); *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration*), Amendments of Sections 64.702 of the Commission's Rules and Regulations, Report and Order, CC Docket No. 85229, 2 FCC Rcd 3072 (1988) (*Phase II Order*), *recon.*, 3 FCC Rcd 1150 (*Phase II Reconsideration*), *vacated sub nom.* California v. FCC, 905 F2d 1217 (9th Cir. 1990), *appeal pending sub nom.* Illinois Bell Tel. v. FCC, No. 881364 (D.C. Cir. pet. for rev. filed May 16, 1988).

[2] The Commission recently adopted revised safeguards in this area. *See Computer III* Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, CC Docket No. 90-623, FCC 91-381, adopted Nov. 21, 1991.

[3] Filing and Review of Open Network Architecture Plans, CC Docket No. 882, Phase I, 5 FCC Rcd 3103 (1990) (*ONA Amended Plans Order*).

[4] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 8979, Report and Order, Order on Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991) (*Part 69 ONA Order*).

[5] *Part 69 ONA Order*, 6 FCC Rcd at 4531, para. 42; 4532, para. 48. The Bureau also specified requirements for cost support materials, including an onthe-record filing of any computer-based costing model, in the *ONA TRP Order*. Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Tariffs, 6 FCC Rcd 5682 (Com.Car.Bur. 1991) (*ONA TRP Order*). However, the BOCs claimed that their computer-based costing model, the Switching Cost Information System (SCIS), was proprietary or trade secret information, and therefore exempt from public disclosure requirements. The Bureau temporarily waived the *ONA TRP Order*, to the extent it required submission of SCIS on the public record, while it examined SCIS *in camera* to evaluate the model contained of trade secrets or proprietary information as the BOCs claimed.

4. Eleven parties filed petitions to reject or suspend and investigate ONA tariffs filed by six BOCs,[6] and seven parties filed replies.[7] A major focus of the petitions was the wide disparity in the rates filed by BOCs for important BSEs such as Automatic Number Identification (ANI). We have reviewed these transmittals and comments filed by interested parties. We have also performed a preliminary *in camera* review of the BOCs' costing models, and in a companion Order released today provide for additional disclosure of these models to parties and to an independent auditor.[8] Our review of the BOC submissions and the pleadings leads us to conclude that the ONA offerings before us present substantial questions that warrant investigation. In particular, some BOCs have used rate calculation methodologies that may not produce just and reasonable BSE charges and, moreover, contribute to BSE charges that appear anomalously high in comparison to other BOCs. We will therefore initiate an investigation of all BOC ONA transmittals. We are also taking action to protect customers in the event ONA rates prove to be unreasonable. All transmittals were scheduled to become effective on February 1, 1992. Instead, the transmittals will become effective on February 2, 1992, following a one-day suspension, subject to an accounting order to facilitate any refunds that later prove necessary.[9] In this Order, we review(the arguments raised by petitioners, the BOC responses, and identify areas of concern. We will designate issues for this investigation in specific detail in a later Order.

II. RATE LEVEL ISSUES

A. General

1. SCIS Disclosure

5. *Background.* The *Part 69 ONA Order* adopted a flexible, cost-based approach to ONA pricing that requires BOCs to base rates for BSEs on direct costs plus reasonable overheads. BSAs are priced residually to satisfy the revenue neutrality standard.[10] To develop BSE rates, the BOCs have employed the Switching Cost Information System (SCIS), a computer model that simulates a central office switch and apportions its capacity and cost among the functions the switch provides.[11]

6. The Bureau's *ONA TRP Order* required the BOCs to provide the SCIS model and associated documentation when filing their ONA tariffs.[12] The BOCs each sought waiver of this requirement, claiming that carrier and switch vendor data used as inputs to SCIS, and the Bellcore-maintained software that constitutes the model itself, are proprietary information. To review these contentions, the Bureau required one BOC, Ameritech, to submit its SCIS model, and the Bureau staff initiated a detailed *in camera* review.[13] The Bureau subsequently required each BOC to submit its SCIS model for one study area, and its complete SCIS inputs and outputs for all study areas, for *in camera* review by the Commission.[14] In addition, in the companion *SCIS Disclosure Order* released today, the Bureau establishes procedures by which, and the conditions under which, parties in the ONA tariff investigation may examine a redacted version of SCIS.

7. *Pleadings.* Several parties maintain that the BOCs' ONA cost support is inadequate, because the BOCs rely on SCIS data which has not been disclosed to the public.

Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Tariffs, 6 FCC Rcd 6131 (Com.Car.Bur. 1991) (*Ameritech TRP Waiver Order*). SCIS is discussed in more detail below.

[6] The Ameritech Operating Companies (Ameritech) filed tariffs to implement its ONA Plan prior to the November 1, 1991, deadline established by the Commission. Ameritech's ONA transmittals became effective on December 31, 1991, following a one-day suspension, and subject to an accounting order. Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2, Open Network Architecture, Memorandum Opinion and Order, DA 91-1633, released Dec. 27, 1991 (Com.Car.Bur.) (*Ameritech ONA Tariff Order*). *See also* Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2, Open Network Architecture, Local Exchange Carrier Line Information Database, Modification of Orders, DA 92-94, released January 24, 1992 (Com.Car.Bur.).

[7] The parties filing petitions and replies, and the abbreviations by which these pleadings are referenced, are listed in Appendix A of this Order. Metromedia also filed a motion to accept its late-filed pleading. Metromedia claimed that it filed its petition one day late due to a failure in the word processing system of its counsel. Because Metromedia's late filing does not prejudice any party to this proceeding, we grant Metromedia's motion. By a request for special permission filed December 6, 1991, Nevada Bell sought approval to correct errors and omissions in Transmittal 123, including recalculations of Actual Price and Service Based Indices that were mistakenly premised on premature inclusion of ONA offerings within the indices. Nevada Bell Reply at 3-4. The Bureau granted Special Permission No. 91-1084 for this purpose. On December 10, 1991, Southwestern Bell sought special permission to correct omissions in its ONA filings regarding information on testing capabilities. The Bureau granted Special Permission No. 91-1090 for this purpose, and Southwestern Bell filed Transmittal No. 2159 under this special permission on December 13, 1991.

[8] Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, DA 92-129, released January 31, 1992 (*SCIS Disclosure Order*).

[9] This accounting order will apply to all BSA and BSE rates. This does not imply, however, that any refunds will necessarily be evaluated or computed for individual elements. For example, if one unbundled rate element is found to be too high, while other unbundled elements are too low, we would expect to consider whether the overall net rate for the service is reasonable in evaluating a BOC's refund liability.

[10] *See Part 69 ONA Order*, 6 FCC Rcd at 4531-32, paras. 38-48.

[11] US West uses a model that it calls Switching Cost Model (SCM), which US West alleges to be similar to SCIS. Our preliminary examination of SCM gives us concerns as to whether the model yields reasonable rates, and we will designate specific issues regarding SCM for investigation in a future Order. Nevertheless, our comments and decisions on SCIS made herein also specifically apply to the US West SCM, unless noted otherwise.

[12] Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Tariffs, 6 FCC Rcd 5682, para. 3 n. 3 (Com.Car.Bur. 1991) (*ONA TRP Order), petitions for reconsideration pending.*

[13] *Ameritech SCIS Disclosure Order*, 6 FCC Rcd at 6133, para. 13.

[14] Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, Order, DA 91-1592, released Dec. 23, 1991 (Com.Car.Bur.) (*SCIS In Camera Order)* at para. 2.

Ad Hoc Petition at 20-24; WilTel Petition at 3-5; CompTel Petition at 3-4; MCI Petition at 2-3; Metromedia Petition at 21-23; ANPA Petition at 5-6. Ad Hoc asserts that the BOCs have withheld more than is necessary to keep SCIS proprietary. Ad Hoc Petition at 21-22. WilTel and MCI complain that SCIS is manipulable to produce different outcomes, and that SCIS results are not currently verifiable by third parties. WilTel Petition at 5-7; MCI Petition at 15-17. MCI theorizes that there are differing assumptions or costing methodologies within the SCIS model, which may account for the wide disparity in cost figures and rates between BSEs. MCI Petition at 17-18. CompTel asserts that any SCIS disclosure now would be too late unless the BOCs' ONA tariffs are suspended and the public has another opportunity to comment. CompTel Petition at 4-5. MCI believes it has been denied due process by having to petition against the tariffs without an opportunity to review the SCIS model. MCI Petition at 7.

8. The BOCs argue that SCIS disclosure is an issue pending before the Commission, and therefore the lack of SCIS availability is not a reason to reject or suspend their ONA tariffs. Bell Atlantic Reply, App. A, Item 7; BellSouth 24-25; Pacific Bell Reply at 21-22; Nevada Bell Petition at 10-11; Southwestern Bell Petition at 18. Southwestern Bell and US West contend they are attempting to fashion nondisclosure agreements, and the Commission should be able to determine the reasonableness of the model outputs used in developing ONA tariffs. Southwestern Bell Reply at 17-18; US West Reply at 9-10. BellSouth notes that, while SCIS itself was not made available to petitioners, a detailed description of the model was provided. BellSouth Reply at 24-25. Bell Atlantic also disagrees with MCI that petitioners have any due process rights to review its cost support information. Bell Atlantic Reply, App. A, Item 7.

9. *Discussion.* Our preliminary, *in camera* review of the SCIS model and data has not revealed substantial defects that would warrant rejecting the ONA tariffs. However, we also conclude that further investigation is necessary to assure that the rates are reasonable and in compliance with the ONA Orders. Our companion Order setting disclosure procedures for the SCIS model and data will permit effective participation in this investigation by interested parties on the SCIS issues, and provides for an independent audit of computer models to supplement the staff's *in camera* review process.

2. Assumptions Made When Using SCIS

10. *Background.* The equations within the SCIS model include variables that enable SCIS users, *i.e.*, the BOCs, to alter the model's operating premises to fit assumptions they make concerning their networks, and other assumptions relevant in determining the costs of providing BSEs. These variables include the BOCs' cost of money; proportion of types of switch technology within each BOC's network; and amount of traffic flowing through a network relative to that network's capacity, among others.

a. Average v. Marginal Investment

11. The SCIS model develops the investment associated with each BSE in a representative central office using specified switch technology, based on a combination of carrier-specific inputs, vendor-specific switch component costs, and real time data.[15] The investment can be developed on an "average basis," which apportions the investment associated with each component required by the average office to the BSE's costs. Alternatively, the SCIS model can be set to recognize these common costs of the office only on a "marginal" basis, which includes such investment elements only to the extent that the new service directly requires purchases of additional capacity or specialized equipment.

12. Our review of the carriers' SCIS submissions reveals that two of the seven BOCs are using marginal costing to support BSE rates. This method may not be appropriate. We will designate for investigation the issue of whether this is an appropriate method in the upcoming Designation Order.

b. Cost of Money

13. *Pleadings.* Sprint objects to Bell Atlantic's use of 13.05 percent as its cost of capital, contending that Bell Atlantic should follow other BOCs in using the prescribed 11.25 percent rate of return. Sprint Petition at 17-18. Bell Atlantic replies that the figure referred to by Sprint does not represent the cost of capital, but rather the overall cost of money from different sources. Bell Atlantic also asserts that the cost of money figure on which it specifically bases its rates is 9.8 percent, rather than the 13.05 percent alleged by Sprint. Bell Atlantic states that the 13.05 percent figure is the cost of money for local switching investment placed in service on January 1. Bell Atlantic Reply, App. A, Item 9, *citing* D&J, Workpapers 7-2 to 7-12. Bell Atlantic also denies that it should have used the prescribed rate of return rather than cost of money to develop rates. According to Bell Atlantic, rate of return is a measure of the earnings a business is entitled to, while cost of money is a measure of the financial expense associated with the purchase of the investment used in providing a service. *Id.*

14. *Discussion.* In the *Ameritech ONA Tariff Order*,[16] the Bureau noted that Ameritech based its cost of money calculations on data inconsistent with Ameritech's submission to the Commission in the proceeding leading to the recent *Represcription Order*.[17] Overstating cost of money would lead to overstated BSE investment results derived from the SCIS model, resulting in excessive BSE rates. Accordingly, we said that issues regarding Ameritech's use and calculation of cost of money may be set for investigation in a subsequent Order. For the same reasons, cost of money calculations of other BOCs appear to warrant investigation.

15. Of the carriers currently before us, it appears that all but BellSouth and New England Telephone Co. use a cost of money higher than 11.25 percent. We will address this issue in the Designation Order.

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[15] Real time is the time required by the various switch components to provide a BSE service.

[16] *Ameritech ONA Tariff Order*, at para. 12.

[17] Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507 (1990), at App. 1 (*Represcription Order*).

c. Other Considerations

16. SCIS users have freedom to set other variables within the SCIS model, such as switch exhaustion,[18] Equipment Furnished and Installed (EFI) or Material, [19] and others. The Designation will identify which variables warrant investigation.

3. Embedded v. Prospective Switch Equipment

17. In addition to the variables within the SCIS model discussed above, the BOCs have a great deal of discretion in the subsequent treatment accorded their SCIS outputs when developing BSE rates. One factor which may vary the outcome is the ratio of old switching equipment to new switching equipment in the BOCs' networks. The costs of providing certain BSEs can vary dramatically, depending on the type of switch used to provide those BSEs. For example, Pacific Bell claims that unit investment for CO Announcement ranges from $15.30 for a DMS switch to $4588 for a 5ESS switch. Pacific Bell Reply at 18 n. 39. In addition, some BOCs base BSE rates on the existing mix of switch technology in their networks, while others base BSE rates on projected technology mix. This choice is important because many BSEs are much more expensive to provide from switches with older technology, and those old switches will eventually be replaced by switches with new technology. Much of the variation in BSE rates is caused by this difference in methodology.

18. A forward-looking view might more accurately reflect the direct costs of providing BSEs in the future and encourage cost-effective technological improvements. In our upcoming investigation, we will examine whether BOCs should revise their rates, excluding or minimizing the impact of facilities such as near-obsolete switches in their BSE rate calculation.

4. Compliance with Commission's Cost Support Requirements

19. *Pleadings.* AT&T asserts that the BOCs' cost support is incomplete because the BOCs have not submitted information such as their "engineering studies, time and wage studies, or other cost support studies to identify the direct costs of providing" ONA services, as required by the Bureau's *TRP Order.* AT&T Petition at 9-11, and App. D, *citing Part 69 ONA Order,* 6 FCC Rcd at 4531, para. 42. Most of the BOCs maintain that their descriptions of SCIS, and explanation that SCIS produces unit investments, to which cost factors are applied to arrive at direct costs, satisfy the Commission's ONA cost support requirements. Pacific Bell Reply at 21; Southwestern Bell Reply at 27-29; NYNEX Reply at 5-6; US West Reply at 14-15; BellSouth Reply at 20-25. US West asserts it has used the same costing methods applied to ONA services in all other new service filings under price cap regulation, and it would be inappropriate for the Commission to adopt more detailed costing requirements than are already contained in its rules.[20] US West Reply at 14-15; BellSouth Reply at 22-23; Bell Atlantic Reply, App. A, Item 8. Nevada Bell and Pacific Bell assert that time and wage studies are required only to support nonrecurring charges, and claim that they did not unbundle any nonrecurring charges. Nevada Bell Reply at 10-11; Pacific Bell Reply at 23.

20. *Discussion.* In the *Part 69 ONA Order,* we concluded that the BSEs would be classified as "new services" within the meaning of the price cap rules. We also required that specific cost support would be provided for all new service filings, and that the cost support would include: (1) a study containing a projection of costs for a 12-month period; (2) estimates of the effect of the new service on traffic and revenues, including the traffic and revenues of other services; (3) supporting workpapers for estimates of costs, traffic, and revenues; (4) appropriate overhead loadings; and (5) ratios of direct unit cost to unit investment, and direct unit cost to unit price. [21]

21. By completing the charts provided in the *ONA TRP Order,* the BOCs provide only summary data required for new services. The supporting workpapers which show the financial data underlying the summary data have been generally omitted or are incomplete. At a minimum, we expect BOC workpapers in support of the direct costs that appear in the TRP Chart Unit will include all actual data used to derive the factors, references to the sources of the data, the calculations used to produce the factors, and the data to which the factors are applied to obtain direct costs. For overhead loadings, we expect that BOCs will include a clear explanation of how the overhead loading factors are developed, actual data used in determining factors, and a reference to the source data. Also, if nonrecurring charges are introduced, we expect the BOCs to provide workpapers showing the amount of time required by various employees to perform the various tasks required, as well as the employee wages.

22. Although this deficiency does not warrant rejection in these circumstances, the additional information will assist us in framing investigation issues. Therefore, we now Order the BOCs to comply with the relevant requirements of the *Part 69 ONA Order* within ten days of the release date of this Order.

5. Demand Estimates

23. Allnet claims that interstate switched access minutes of use (MOUs) have grown at a rate averaging over 12 percent annually, and observes that many BOCs' demand estimates are less than 9 percent. Allnet Petition at 7-8. Ad Hoc and MCI observe that the BOCs have widely disparate demand estimates for some BSEs. MCI Petition at 32-35, Ad Hoc Petition at 16-18. Similarly, Allnet and Metromedia allege methodological errors in the BOCs' estimation of automatic number identification (ANI) de-

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[18] Switch exhaustion is the time when a particular switch is expected to need replacement by another switch with greater capacity.

[19] Material includes only the purchase price of the switch itself, while EFI includes costs associated with the installation of the switch, including taxes.

[20] Pacific Bell repeats that it considers SCIS to be proprietary, and notes that the Bureau has tentatively waived requirements that SCIS be submitted on the record while it reviews the model *in camera.* Pacific Bell Reply at 21-22. Pacific Bell contends that its cost factors are also proprietary, and could not be submitted *in camera* without thousands of personhours to recreate basic studies. Pacific Bell also asserts that the equations, factors, and coded notation underlying its cost factors would be of limited usefulness. Pacific Bell Reply at 22-23.

[21] *Part 69 ONA Order,* App. C, 6 FCC Rcd at 4543.

mand. [22] Allnet Petition at 7-8; Metromedia Petition at 15-16. Ad Hoc advocates establishing benchmarks for demand estimates and imposing partial disallowances under the Commission's Section 204(b) authority. Ad Hoc Petition at 16-18, *citing* Section 204(b) of the Communications Act, 47 U.S.C. § 204(b). AT&T complains that many BOCs have not provided cross-elasticity studies. AT&T Petition at 11-13. Allnet also criticizes the BOCs for failing to account for demand migration from the intrastate to the interstate jurisdiction. Allnet Petition at 89. Allnet suggests that BOCs should be required to account for any demand stimulation they expect to occur when ONA services are incorporated into price cap regulation. Allnet Petition at 10.

24. The BOCs contend generally that their demand estimates are consistent with their historical experience, or are reasonably developed. [23] NYNEX Reply at 15-17; Bell Atlantic Reply, App. A, Item 5, Item 13; BellSouth Reply at 28; Nevada Bell Reply at 14-15; Southwestern Bell Reply at 20-21. Several carriers assert that Allnet's 12 percent growth figure for MOUs is inaccurate. Bell Atlantic Reply, App. A, Item 5; BellSouth Reply at 29; NYNEX Reply at 14-15. Many carriers maintain that variations in demand forecasts are not indicative of unreasonable rates. Pacific Bell Reply at 23-24; Nevada Bell Reply at 14; Southwestern Bell Reply at 21; BellSouth Reply at 29-30; Bell Atlantic Reply, App. A, Item 12. The carriers also maintain that they have made all the showings of cross-elastic effects and other demand showings required of them. Southwestern Bell Reply at 28-29; NYNEX Reply at 17-18; BellSouth Reply at 30-31; Nevada Bell Reply at 14. Many BOCs maintain that demand projections have no effect on ONA rates, or the results of the net revenue test or the revenue neutrality test. Bell Atlantic Reply, App. A, Item 5; BellSouth Reply at 27-28; Pacific Bell Reply at 24; Nevada Bell Reply at 13-14; NYNEX Reply at 14-15.

25. *Discussion.* The debate over the relevance of demand "levels to BSE rates appears to be primarily an issue of whether the SCIS model is reasonable at reasonable demand levels. Other demand questions do not appear to warrant investigation at this time.

B. Comparisons of BOCs' ONA Rates and Cost Support

1. Disparity in Rates

26. *Pleadings.* Several petitioners note wide variation in the BOCs' unit costs and unit investment, and suggest that this indicates flaws in ratemaking methodology. Sprint Petition at 16-17; WilTel Petition at 6-11; Allnet Petition at 11-12; AT&T Petition at 16-17 and App. 6; CompTel Petition at 7; Ad Hoc Petition at 7-9, 15, and Table 7; GSA Petition at 5; MCI Petition at 13-14, 22-24; Metromedia Petition at 24-25; ANPA Petition at 5-6. Ad Hoc claims that carriers with similar demand projections for similar BSEs still intend to charge divergent rates, and concludes that either those BSEs are virtually price inelastic, or the BOCs have serious methodological problems in the rate development. [24] Ad Hoc Petition at 18-19. CompTel believes that the Commission's flexible cost-based approach confers too much flexibility on BOCs. [25] CompTel Petition at 2-3. WilTel asserts that the BOCs can use inconsistent costing methodologies to engage in discrimination. WilTel Petition at 12-13.

27. Many BOCs note that the Commission adopted a flexible cost-based approach. Those BOCs contend that the Commission rejected the kind of uniformity advocated by the petitioners. BellSouth Reply at 10-12, 34-35; Pacific Bell Reply at 13-15; Nevada Bell Reply at 7-9. Pacific Bell contends that the cost support requirements established by the Commission in the *Part 69 ONA Order* are sufficient to protect against unreasonable prices or anticompetitive behavior. Pacific Bell Reply at 13-15. BellSouth also argues that criticisms based on nonuniform rates ignore variations in other access rates from region to region. *Id.* at 10-12. Other BOCs suggest several potential explanations for the variation: 1) the BOCs have different types of switches within their regions; 2) BOCs might base ratemaking decisions on costs of forward-looking technologies; 3) network architecture varies among BOCs; and 4) each BOC has unique capital and expense costs. Southwestern Bell Reply at 24-25; BellSouth Reply at 2527; US West Reply at 12 n. 36; Nevada Bell Reply at 7-9, 12-13; Pacific Bell Reply at 18 n. 39; NYNEX Reply at 7-9. Some BOCs maintain that some of the rate variation is due to some BOCs basing their SCIS calculations on average investment, while others use marginal investment. BellSouth Reply at 25-27; Southwestern Bell Reply at 25; NYNEX Reply at 7-9; US West Reply at 12 n. 36. Bell Atlantic claims that the petitioners have not compared BSEs on a consistent basis. For example, Bell Atlantic refers to its Message Desk BSE, which it offers as one rate

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[22] ANI is provided once for each message regardless of length. While US West used historical information on messages to forecast ANI demand, other BOCs used minutes of use data and assumed call duration. Allnet believes only US West's ANI Demand forecast method is reasonable. US West states that it misclassified some premium traffic sensitive minutes as non-premium, resulting in an overestimation of ANI demand. Correcting the non-premium ratio to test period demand to reflect that declining trend, however, affects only the ANI Net Revenue test, US West states, and that only by some $18,000; the correction has no effect on costs, rates or revenue neutrality because total traffic sensitive minutes are correct and revenue neutrality is determined using only historical data. US West Reply at 17-18.

[23] By its December 6, 1991 request for special permission, Nevada Bell sought to revise forecasted BSA and BSE demand for 1992. Nevada Bell Reply at 4.

[24] CompTel also complains that recasting historical base period demand frustrates any reliance on existing price cap indexes as benchmarks for evaluating new rates. CompTel Petition at 2-3. Pacific Bell maintains that recasting historical demand for unbundled ONA services was intended to prevent BOCs increasing revenue by unbundling, not to assist in evaluating rates. Pacific Bell Reply at 24.

[25] As an example of excessive rate variation, AT&T claims NYNEX Alternate Routing BSE rate is 27 cents per month, while Southwestern Bell's rate is $5.50 per month; and Ameritech's unit costs for CBND is 27 times greater than those of BellSouth for the same service, and NYNEX's unit costs are 19 times greater than those of BellSouth. AT&T Petition at 14-17. *See also* Ad Hoc Petition at 13-14; CompTel Petition at 5-6; WilTel Petition at 16-18.

element, while Ameritech plans to charge for this service as a DNAL and two other rate elements. Bell Atlantic Reply, App. A, Item 6.

28. Ad Hoc and CompTel recommend applying benchmarks and imposing partial disallowances under Section 204(b) of the Communications Act, as the Bureau did in the 1989 and 1990 annual access orders. [26] Ad Hoc Petition at 11-12; CompTel Petition at 5. Alternatively, Ad Hoc argues that, given the wide variances in rates and costs, it is difficult to assume that an average of the BOCs' costs or charges would be a reasonable benchmark, and recommends rejecting all ONA tariffs and initiating an investigation into the costs carriers incur in providing BSEs. Ad Hoc Petition at 11. Similarly, CompTel argues that recasting historical base period demand frustrates any reliance on existing price cap indexes as benchmarks for evaluating BSE rates. CompTel Petition at 2-3. Pacific Bell asserts that petitioners have not shown that uniform rates advance any public interest purpose, and claims that a "benchmark" approach would be inconsistent with the Commission's Orders recognizing cost and market differences among BOCs. Pacific Bell also believes cost uniformity does not necessarily imply reasonable rates, because costs can vary up to 300 fold depending on the types of equipment or technology used to provide the service. Pacific Bell asserts costs can vary depending on the proportion of digital to electromechanical switches for each BOC, and the prices different switch vendors negotiate with different BOCs. Pacific Bell Reply at 16-18.

29. *Discussion.* The magnitude of the disparities in BSE rates indicates that some BOCs may have used rate development methodologies that are not likely to produce reasonable BSE rates. We are initiating an investigation of the rates and will consider possible explanations for these disparities in framing the issues.

2. Uniformity of Overhead Ratios

30. *Pleadings.* AT&T notes wide variations in the BOCs' relationships between direct costs and overhead costs. According to AT&T, BellSouth's overhead to total cost ratio for CBND is 68.42 percent, while the same ratio is 15.72 percent for Nevada Bell. AT&T Petition at 14-17. *See also* Ad Hoc Petition at 13-14; CompTel Petition at 5-6; WilTel Petition at 16; GSA Petition at 6-9; MCI Petition at 18-19. Some commenters assert that the difference between direct costs and rates for some services can be explained only by application of a risk premium, and note that none of the BOCs has made the showing required by the *Part 69 ONA Order* for risk premiums. Sprint Petition at 1718; AT&T Petition at 18-20; Ad Hoc Petition at 19-20. Allnet asserts that any BSE rate which results in a direct-cost-to-rate ratio of less than. 70 is unreasonable. Allnet Petition at 11.

31. The BOCs contend that the Commission did not require uniform overhead loading ratios for ONA tariffs. BellSouth Reply at 36-37; Pacific Bell Reply at 18-19; US West Reply at 10-11. The BOCs also argue that the absolute rather than relative overhead costs are important, and they showed that their overheads were reasonable in their D&Js. Pacific Bell Reply at 18-19; Nevada Bell Reply at 9-10; BellSouth Reply at 35-37; US West Reply at 10-11. Southwestern Bell maintains that its overhead ratios are higher than those of other BOCs because it has more nonpremium demand relative to premium demand than do other BOCs. Southwestern Bell explains that, since it is required to set its nonpremium rates at 45 percent of its premium rates, and some of its overhead costs are recovered from nonpremium rates, it must set its overhead ratios higher than other BOCs to recover all its overhead costs. Southwestern Bell Reply at 26-27.

32. *Discussion.* The Commission concluded that it would not be necessary to mandate any uniform overhead loading methodology, but merely required BOCs to load overheads consistently, or justify any inconsistencies. [27] Thus, specific limits to overhead loadings, such as the. 70 ratio suggested by Allnet, seem unwarranted. Individual loadings and methodologies may, however, present issues to be designated for investigation.

C. Carrier-Specific Issues

1. Southwestern Bell Packet Switching

33. *Background.* In Transmittal No. 2146, Southwestern Bell offers nine new features to be made available with its MicroLink II packet switching service. [28] These nine features were approved as BSEs in Southwestern Bell's ONA Plan. Tr. 2146 D&J at 2-1. Southwestern Bell plans to impose a nonrecurring charge when a customer orders these new features; there are no existing customers using these features. *Id.* at 1-4 to 1-9. Southwestern Bell also intends to charge recurring rates for each of its features, but has set all but two of these rates at zero until it develops demand data. According to Southwestern Bell, it set the non-zero rates for Customer Alerting and Menu Server significantly above its costs, and explains this practice as due to the competitive market price for those services. [29] *Id.* at 27; 2-13. Finally, Southwestern Bell establishes a nonrecurring charge for the rearrangement of user facilities, to be imposed whenever a customer requests installation of packet switching service, or requests changes in the protocol parameters of that customer's interconnection. *Id.* at 1-1.

34. *Pleadings.* MCI filed a separate petition against Transmittal 2146. MCI maintains that Southwestern Bell's rates for Customer Alerting and Menu Server are unreasonable because they are set substantially above costs. MCI Petition (2146) at 2-4. Southwestern Bell claims rates

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[26] Allnet argues that the Commission should determine whether rates are reasonable before ONA tariffs take effect. Allnet says the decision in *Ohio Bell v. FCC* casts doubt upon the Commission's refund authority. Allnet Petition at 2-3, *citing* Ohio Bell Telephone Co. v. FCC, No. 90-3146, (6th Cir., Decided Nov. 21, 1991).

[27] *Part 69 ONA Order,* 6 FCC Rcd at 4531, para. 44.

[28] These new features are Customer Alerting; Fast Select; Menu Server; Packet Call Redirection; Packet Direct Call; Packet Group; Recognized Private Operating Agency (RPOA) Preselection; Extended RPOA; and Reverse Charge Acceptance. Southwestern Bell Transmittal No. 2146, Description and Justification (Tr. 2146 D&J) at 1-2, 1-3.

[29] Tr. 2146 D&J at 1-9. Southwestern Bell plans to charge 15 cents per minute for Customer Alerting, and two cents per line per month for Menu Server. *Id.* at 2-25 to 2-29. Southwestern Bell intends to charge for its other seven features on a flat monthly basis when it establishes rates for those features. *Id.* at 1-9.

were set to avoid arbitrage between the interstate and intrastate jurisdictions. In addition, Southwestern Bell argues that there are software costs related to two other services that must be recovered from the Customer Alerting element.[30] Southwestern Bell also contends that it expects its Menu Server element to recover $27.92 over costs, annually. Southwestern Bell Reply at 41-42.

35. MCI also alleges that Southwestern Bell has not submitted any of the cost support information required for new services by Section 61.38(b) of the Commission's Rules. MCI Petition (2146) at 4-5, *citing* 47 C.F.R. § 61.38(b). Southwestern Bell argues that it did comply with the requirements of Section 61.38, by providing the results of a cost of service study and a showing of the revenue impact of offering these features. Southwestern Bell Reply at 40-41. Southwestern Bell asserts that it submitted similar cost support for other new services, including its original MicroLink II filing. [31]

36. *Discussion.* Southwestern Bell's cost support data does not appear to comply with Section 61.49(g) of the Commission's Rules, because Southwestern Bell does not provide any of the workpapers from which it derives its cost figures. [32] In addition, Southwestern Bell intends to establish a Menu Server rate that is double its Menu Server costs, and a Customer Alerting rate over 500 percent of its Customer Alerting costs. *See* Tr. 2146 D&J at Figure 3, Figure 4. We will examine these rates in the upcoming investigation.

2. Net Revenue Test

37. *Pleadings.* Sprint claims that certain BSEs of Southwestern Bell [33] fail the net revenue test. Sprint Petition at 19 n. 24. Southwestern Bell does not respond to Sprint's contention in its reply.

38. *Discussion.* Based on the information before us, Southwestern Bell's rates for its alternate routing and multiline hunt group apparently will not generate net revenue. We will, therefore, examine these Southwestern Bell rates in the investigation.

3. Revenue Neutrality Showing

39. Sprint claims that NYNEX, Pacific Bell, and Southwestern Bell fail the revenue neutrality showing. Sprint Petition at 19. Those BOCs reply that the amounts by which they expect their revenues to increase are *de minimis*. NYNEX Reply at 12-14; Pacific Bell Reply at 15 n. 33; Southwestern Bell Reply at 29-30. We agree with the BOCs that their revenue neutrality data shows only *de minimis* revenue changes, and do not warrant investigation.

III. RATE STRUCTURE ISSUES

A. Differences in Nomenclature

40. *Pleadings.* Several petitioners complain that the BOCs are offering BSEs on a non-uniform basis in terms of nomenclature, which they claim complicates ordering and provisioning of ONA services as well as access bill auditing procedures. These petitioners also claim that the disparity in rate structure makes it difficult to assess the reasonableness of rates. Sprint Petition at 10-11; AT&T Petition at 4 n. *, 13, CompTel Petition at 9; Metromedia Petition at 7-11; GSA Petition at 5-6. Metromedia suggests that the Commission should prescribe BSE names and require the carriers to adopt standard nomenclature. Metromedia Petition at 7. MCI asserts that BOCs provide BSEs under the same name but with apparently different functional characteristics. MCI Petition at 26-27.

41. The BOCs maintain that the issue of uniformity was decided in a prior Commission Order. Bell Atlantic Reply, App. A, Item 1, at 1-2, *citing BOC ONA Order*, 4 FCC Rcd at 1; Pacific Bell Reply at 9-11; Nevada Bell Reply at 4-5; BellSouth Reply at 12; US West Reply at 3-4. Southwestern Bell contends that BOCs need flexibility in product names to allow for trademark or service mark registration, and claims that nonstandard BSE nomenclature presents no reason to suspend its tariff. Southwestern Bell Reply at 5-6. NYNEX states its willingness to work within industry groups such as the Information Industry Liaison Committee (IILC) to achieve greater uniformity in nomenclature. NYNEX Reply at 30-32.

42. *Discussion.* In the *ONA Further Amendments Order*,[34] the Commission recognized the difficulties posed by "differences in service names and service aggregation," and required BOCs to use the generic names in the *ONA Service User Guide* provided by Bellcore in addition to the individual BOC service name when reporting deployment. BOCs were required to use generic names as well as service names for all relevant ONA reports, and the Commission delegated to the Common Carrier Bureau authority to implement these requirements. Accordingly, the Bureau's staff has informally requested the carriers to insert tables at appropriate places throughout their tariffs cross-referencing their BSE trade names with the generic Bellcore names. We believe this is adequate to reduce the confusion generated by the BOCs' nonuniform nomenclature. However, we will continue to monitor ONA tariffs, and will take further action to remove confusing language if necessary.

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[30] Southwestern Bell does not specify what these other two services are in its reply, but claims that these costs are $10,171.74. *See* Southwestern Bell Reply at 42. In its D&J, Southwestern Bell explains this figure as the costs associated with providing Customer Alerting from 1A ESS, 5 ESS, and DMS 100 switches. Tr. 2146 D&J at 2-7.

[31] Southwestern Bell Reply at 41, *citing* Southwestern Bell Telephone Company, Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations to Provide and Market Asynchronous Protocol Conversion on an Unseparated Basis, 5 FCC Rcd 161,162, para. 5 (1990) (*Southwestern Bell Protocol Conversion Waiver Order*).

[32] The *Southwestern Bell Protocol Conversion Waiver Order* cited by Southwestern Bell is not relevant here. In that Order, Southwestern Bell was operating under a waiver of the Commission's cost support rules. *See Southwestern Bell Protocol Conversion Waiver*, 5 FCC Rcd at 162 n. 8; Southwestern Bell Telephone Company; Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations to Provide and Market Asynchronous Protocol Conversion on an Unseparated Basis, 2 FCC Rcd 20, 26, para. 54 (Com.Car.Bur. 1987).

[33] Specifically, Sprint cites alternate routing and multiline hunt group uniform call distribution.

[34] Filing and Review of Open Network Architecture Plans, CC Docket No. 882, Phase I, 6 FCC Rcd 7646 (1991) (*ONA Further Amendments Order*) at para. 9.

B. Differences in Rate Structure

43. *Pleadings.* MCI states that none of the BOCs charge for ANI on a minute-of-use basis, but would charge for ANI instead on a per "call," "attempt," "message," or "delivered" basis. MCI asserts that carriers should be instructed to standardize tariffs to charge ANI on a per "message" basis, *i.e.,* for each "wink" received from the interexchange carrier. MCI Petition at 38-39. Some other petitioners generally maintain that there is variation in rate structure for several BSEs, and that this variation in rate structure for several BSEs makes it difficult to compare rates and assess their reasonableness. AT&T Petition at 13; GSA Petition at 4; Sprint Petition at 11-12; MCI Petition at 39-43. Several petitioners complain that access bill auditing procedures and the ordering and provisioning of ONA services will be unnecessarily complicated because the BOCs are offering BSEs on a non-uniform basis in terms of nomenclature and rate structure. [35] Sprint Petition at 10-11, 14-15; AT&T Petition at 4 n. *, 13; CompTel Petition at 8-9; Metromedia Petition at 11-13.

44. The BOCs generally assert their rate structures are reasonable, and that their pricing of ANI is equivalent to pricing "per message" as MCI requests. BellSouth Reply at 31-32; Southwestern Bell Reply at 5. US West responds its pricing of ANI on a "per attempt" basis is consistent with current access charge billing practice. US West Reply at 19. BellSouth notes that MCI generally questions rate structure for several BSEs, and asserts that its rate structures are not unreasonable only because they are different from those of other BOCs. BellSouth Reply at 32-34. BellSouth notes that access customers today routinely deal with differing terms and conditions without undue hardship. BellSouth Reply at 38.

45. In addition, MCI states that two BSEs have been priced purely as recurring elements by some BOCs, and purely on the basis of nonrecurring elements by others. [36] MCI Petition at 24-26. BellSouth claims that MCI is wrong in asserting that Multiline Hunt Group - Individual Access to Port requires no additional investment over Multiline Hunt Group, because the former requires additional memory. BellSouth Reply at 32-33. As to MCI's objection to recurring charges for alternate routing, NYNEX asserts that this service entails not only entry into the translation function of the central office switch, but activation each time a call is alternately routed. NYNEX Reply at 12.

46. *Discussion.* The Commission in the *Part 69 ONA Order* concluded that it would not be necessary or appropriate to impose a uniform rate structure on the BOCs, requiring only that rate structures "reasonably reflect the nature of the underlying costs."[37] The Bureau has reviewed the BOCs' cost support information, the petitions against those tariff revisions, and the carriers' replies. We conclude that there is no reason to investigate rate structure issues at this time.

C. BSA Structure

1. Unbundling Issues

47. *Pleadings.* Allnet claims that the *Part 69 ONA Order* permits only one trunkside BSA, and by offering three, the BOCs have, in effect, renamed the Feature Groups rather than unbundle them. Allnet Petition at 3-4. BellSouth denies that it is offering three trunkside BSAs. Rather, it claims that it is offering one trunkside BSA with three technical options needed because of the three trunkside feature groups which are incorporated into the BSA. BellSouth Reply at 18-19; *see also* Southwestern Bell Reply at 10 n. 22; Nevada Bell Reply at 6-7.

48. *Discussion.* The *ONA TRP Order* specifically contemplated that BOCs would offer a trunkside BSA with alternatives, and required BOCs to show revenue neutrality for all BSA options. [38] These alternatives are necessary to preserve the discounts available to users served by non-equal access offices. Accordingly, these trunkside BSA options do not warrant investigation.

2. Unbundling Nonrecurring Rates

49. *Pleadings.* MCI states that NYNEX, Pacific Bell, and Nevada Bell have failed to unbundle any nonrecurring BSE charges whatever. MCI observes that NYNEX intends to recover the costs of installation for a BSA/BSE combination by applying its existing local transport nonrecurring charge (NRC). [39] MCI argues that NYNEX nowhere explains why it is appropriate to use local transport NRCs to recover local switching charges. MCI contends that Pacific Bell and Nevada Bell fail to explain just what costs they incur when provisioning BSEs, and how those costs are recovered. MCI Petition at 13-14, 27-29.

50. NYNEX states that it recovers nonrecurring costs through the Local Transport nonrecurring element, since Local Switching is always ordered in conjunction with Local Transport. NYNEX contends this rationale remains valid for BSEs ordered at the same time as a BSA. [40] NYNEX Reply at 10-11. Pacific Bell asserts that MCI's complaint is irrelevant because it has no NRC in local switching and the Bureau in the *TRP Order* stated that, to ensure revenue neutrality, it did not expect new NRCs associated with unbundled BSEs to be required. Pacific Bell Reply at 5-6. Nevada Bell states it did not propose separate NRCs for BSEs in its ONA plan and was not required to tariff such charges. In addition, Nevada Bell

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[35] Sprint suspects that some billing will be further complicated because "it appears likely" that some BOCs will establish separate accounts and send separate bills for an IXC's interstate and intrastate usage. Sprint Petition at 11. NYNEX and Southwestern Bell deny any such plans for separate bills and accounts. NYNEX Reply at 21-22; Southwestern Bell Reply at 4-5.

[36] MCI maintains that US West charges only a nonrecurring rate for its alternative routing service, while NYNEX and Southwestern Bell would establish monthly charges for this service. Ameritech, Pacific Bell, and Nevada Bell charge only nonrecurring element(s) for their Multiline Hunt Group (Individual Access to Port) service, while Bell Atlantic and BellSouth would establish monthly recurring charges for that BSE. MCI Petition at 24-25. MCI also argues that carriers offering this BSE incur no additional costs over those incurred in offering standard Multiline Hunt Group BSE service. *Id.* at 26.

[37] *Part 69 ONA Order,* 6 FCC Rcd at 4533, para. 50.

[38] *ONA TRP Order,* 6 FCC Rcd at 5682-83, paras. 5-6.

[39] A separately ordered BSE will incur half the local transport nonrecurring charge.

[40] NYNEX also asserts it is reasonable to apply the nonrecurring charge for additions and changes to existing Feature Group rate elements when BSEs are added to existing BSA arrangements. NYNEX states that this nonrecurring charge for changes to optional Local Switching charges is half the Local Transport nonrecurring charge.

states that the NRCs would be quite modest, given its reliance on digital technology, while the programming changes to CABS software would cost approximately $70,000. Nevada Bell Reply at 15-16.

51. WilTel criticizes NYNEX and Southwestern Bell for establishing recurring charges for alternate traffic routing, while other BOCs plan to charge only NRCs. WilTel believes that alternate traffic routing should occur, if at all, only pursuant to the outcome in CC Docket No. 91-213. WilTel Petition at 1718. Southwestern Bell contends that it is required to tariff Alternate Routing because it was listed as a BSE in Southwestern Bell's approved ONA plan. Southwestern Bell Reply at 22. Furthermore, asserts Southwestern Bell, Alternate Routing is currently available with certain feature groups as a local switching, not a local transport, feature. Southwestern Bell Reply at 22-23.

52. *Discussion.* The BOCs appear to have adequately addressed the matters raised by the petitioners, and we find no grounds for investigation of these issues at this time.

IV. DISCRIMINATION

A. ANI

53. *Pleadings.* WilTel and Metromedia claim that it is not possible to determine whether the BOCs' ANI offerings are priced in a discriminatory manner, because the BOCs billing and collection services are provided under contract. Therefore, those petitioners conclude that the BOCs could impute to themselves different charges for ANI than they impose on other parties. The petitioners request either that the Bureau prohibit the unbundling of ANI, or that we investigate billing and collection services. WilTel Petition at 13-16; Metromedia Petition at 14-15; *see also* Allnet Petition at 6 (ANI is priced "strategically" to encourage customers to purchase detariffed billing and collection services). In addition, Metromedia argues that a per-message charge for ANI is equivalent to establishing a call setup charge that increases the cost per minute of short duration calls.) [41] Metromedia contends that small IXCs target business customers who have primarily short duration calls, and concludes that small IXCs will be disproportionately affected by the BOCs' ANI rate structure. Metromedia Petition at 15-16.

54. Many BOCs deny that their billing and collection service includes ANI; they maintain ANI can only be purchased in conjunction with Feature Group D (FGD) service, or the ONA equivalent BSA. Nevada Bell Reply at 16-17; Pacific Bell Reply at 25; Southwestern Bell Reply at 19; US West Reply at 20-21. Southwestern Bell and BellSouth reply that ANI has a cost-based rate structure: a charge for ANI each time the information is passed. [42] Southwestern Bell Reply at 19-20; BellSouth Reply at 12-13. Southwestern Bell and BellSouth also contend that billing and collection is not the subject of this proceeding, and therefore should not be considered. Southwestern Bell Reply at 19; BellSouth Reply at 12-13.

55. *Discussion.* The Commission has found that unbundling feature group services, including ANI, is in the public interest. [43] It has been the Commission's policy for over five years that billing and collection services should be provided on a detariffed basis., [44] The petitions relating to possible discrimination in ANI pricing do not pose issues that warrant investigation at this time.

B. Discrimination Arising from ONA Conversion

56. *Pleadings.* Sprint argues that plans by Bell Atlantic, NYNEX, and Southwestern Bell to convert customers to ONA on a carrier identification code (CIC) basis may lead to converting some customers before others on a discriminatory basis. Sprint Petition at 15-16. NYNEX asserts that Sprint has apparently misunderstood its transition plan, which is based on LATA-wide conversion by CIC. Because the transition to unbundled offerings will be initiated by each customer placing an order for unbundled services anywhere in the LATA, the customer will determine the timing of commencement of conversion. NYNEX Reply at 18-20. Southwestern Bell argues that its tariff provides ample assurance of non-discriminatory treatment. Southwestern Bell Reply at 36-37. Bell Atlantic asserts that conversion on a CIC code basis within each LATA will not be discriminatory because it will allow Bell Atlantic to convert customers on a first come first served basis. Bell Atlantic Reply, App. A, Item 2, at 1. BellSouth and Pacific Bell note that they plan to convert customers on a basis more disaggregated than LATA-by-LATA. BellSouth Reply at 38-39; Pacific Bell Reply at 20 n. 44.

57. *Discussion.* Conversion on a CIC code basis, as explained by Bell Atlantic, NYNEX, and Southwestern Bell, appears to be a reasonable transition procedure. As further described by the carriers, this method presents no inherent prospect of unreasonable discrimination. Sprint has offered no basis by which to predict that BOCs will administer an impartial method in an unreasonably discriminatory manner. An investigation on this subject is not warranted at this time.

V. TRANSITION AND IMPLEMENTATION ISSUES

A. Transition

1. Background

58. The *Part 69 ONA Order* provides for a transition period, during which both bundled Feature Groups and unbundled ONA services will be available. The Commission concluded that this transition period would end

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[41] Metromedia contends that the Commission should not allow carriers to establish what it characterizes as a "call setup charge" after rejecting a call setup charge filed by Bell Atlantic. Metromedia Petition at 16 n. 38 (citing Bell Atlantic Telephone Companies, 4 FCC Rcd 7210, 7212 para. 16 (1989)). This Bureau has already found that the assessment of ANI and CND rates on a per message basis does not warrant investigation. *Ameritech ONA Tariff Order*, at para. 27.

[42] Although Southwestern Bell claims that it does not propose a call setup charge in this filing, it suggests that the Commission consider a rate structure that includes both call setup and minutes of use rate elements. Southwestern Bell Reply at 20 n. 40.

[43] *Part 69 ONA Order*, 6 FCC Rcd at 4525, para. 3 n. 5.

[44] Detariffing of Billing and Collection Services, CC Docket No. 85-88, 102 F.2d 1150 (1986) (*Billing and Collection Order*).

when the ONA service rates are incorporated into the carriers' price cap indexes. [45] For the tariffs now before us, this will occur on July 1, 1993.

2. Transition Plan

59. *Pleadings.* Sprint asserts that none of the BOCs have described their ONA plans in sufficient detail to allow customers to plan for the transition from bundled Feature Group access service to unbundled ONA service. Sprint Petition at 12-13. Allnet requests that transition plans be placed in the BOCs' tariffs. Allnet Petition at 12-13. BellSouth and Southwestern Bell state that they will cooperate with customers to assure that ONA conversion procedures are not administratively burdensome. BellSouth Reply at 41; Southwestern Bell Reply at 3-4.

60. Allnet requests that orders for ONA services be considered fulfilled when the orders are actually completed, rather than at the end of the transition period, for fear that a BOC might delay conversion for an IXC while it was attempting to collect conversion charges. Allnet Petition at 13. BellSouth replies that any unconverted feature group services will be converted mechanically at that time, and thus Allnet's concern will be satisfied. BellSouth Reply at 40. Southwestern Bell says that July 1, 1993, is a target date that might change, given the pending petitions for reconsideration, motions for stay, and any possible deferral of the July 1 tariff filing. Southwestern Bell Reply at 33. Southwestern Bell interprets Allnet's argument as a concern about nonrecurring charges associated with conversion, and claims that its tariff clearly states that it will not assess NRCs for conversion from feature groups to BSAs during the transition period. Southwestern Bell Reply at 33-34.

61. Allnet also requests that the Commission prescribe a uniform transition plan for the BOCs. Allnet Petition at 13. Pacific Bell argues that there is no need for a uniform transition plan, that its transition complies with the *Part 69 ONA Order,* and that there is no reason to delay implementation of Pacific Bell's ONA tariffs until all the details of transition are settled. Pacific Bell Reply at 19; *see also* Southwestern Bell 30-31. With over 150 carriers in its region, NYNEX adds, Allnet's argument that the Commission mandate uniform, tariffed transition plans fails to consider the variation in carriers' circumstances. NYNEX Reply at 18-20; *see also* Bell Atlantic Reply, App. A, Item 2, at 2.

62. Sprint states that the effective date of the conversion should correspond to the billing cycle date. Sprint Petition at 14. BellSouth claims that its tariff language is clearly consistent with Sprint's suggestion. BellSouth Reply at 39. *See also* NYNEX Reply at 21-22.

63. *Discussion.* Neither Allnet nor Sprint make convincing arguments that the BOCs' transition plans are not in compliance with any Commission Order, or that anything in those transition plans presents a question that warrants investigation at this time.

3. Imposition of NRC at Conversion

64. *Pleadings.* MCI criticizes the BOCs for not explicitly stating that NRCs will not apply to existing, non-chargeable feature group options to be provided as unbundled BSEs. According to MCI, only Southwestern Bell has stated that access order charges will not apply to such conversions, and Bell Atlantic and Pacific have included provisions stating that feature group-to-BSA conversions during transition will be treated as a discontinuance of service, triggering NRCs and new minimum period obligations. MCI Petition at 36-37. Bell Atlantic states that it will not impose NRCs at the time of conversion. Bell Atlantic Reply, App. A, Item 2, at 1. Pacific Bell asserts that MCI's complaint is irrelevant because it has no NRCs in local switching. Pacific Bell Reply at 5-6. BellSouth replies that NRCs will apply only when a customer orders additional features, not if the customer orders only the same features under ONA tariffs it used under feature group tariffs. BellSouth Reply at 40-41. BellSouth also states that conversions to ONA will not be considered a change in the minimum service period. BellSouth Reply at 41.

65. *Discussion.* Each of the BOCs have adequately demonstrated that no NRCs will be imposed on any customer at the time of conversion who orders no new functions or features at that time. Accordingly, we conclude that no investigation is warranted on this subject.

4. Ordering and Billing

66. *Pleadings.* Sprint notes that Southwestern Bell plans to require IXCs to submit an access service request (ASR) to order BSA/BSE combinations. Sprint proposes that BOCs send IXCs a list of interstate circuits that those IXCs use, and some default BSA/BSE combination to which those circuits will be converted, and allow IXCs to specify any circuits which they wish to be converted to some other BSA/BSE combination. Sprint Petition at 13-14; *see also* MCI Petition at 37-38. Metromedia suggests a longer transition period would ameliorate conversion costs. Metromedia Petition at 13. NYNEX clarifies that it will not require ASRs for the conversion of a bundled service to an identical unbundled offering, but ASRs will be required for any BSA/BSE combination other than one identical to a bundled arrangement. NYNEX Reply at 18-20; *see also* BellSouth Reply at 41-42. Southwestern Bell argues that Sprint's suggestion would impose unnecessary additional costs on the BOCs, and that customers should not be allowed to circumvent the ASR process during the transition period. Southwestern Bell Reply at 31-35. Several BOCs assure Sprint that they have adequate billing systems in place, or will have by the time ONA services are available. Southwestern Bell Reply at 37-38; BellSouth Reply at 42-43; Pacific Bell Reply at 20. Southwestern Bell argues that these expenses are an expected cost of doing business with multiple suppliers, and Sprint does not make a showing of a particular burden in this regard. Southwestern Bell Reply at 3.

67. *Discussion.* The Commission in the *Part 69 ONA Order* found that the period between the effective date of the ONA tariffs and the date on which ONA services will be incorporated into price cap indexes is an adequate transition period to enable the BOCs and their customers to settle all the details involved in converting from Feature Group services to unbundled BSA/BSE arrangements. The Bureau does not have the authority to alter the *Part 69 ONA Order* in the manner advocated by the petitioners, nor is a tariff proceeding a proper place to consider such issues. With respect to the ordering issues,

[45] *Part 69 ONA Order,* 6 FCC Rcd at 4528, para. 20.

some BOCs are requiring ASRs in situations in a manner that might impose unnecessary additional costs on those BOCs' customers at the time conversion to ONA. Accordingly, we conclude that petitioners have described a question that warrants investigation.

5. Other Transition Concerns

68. *Pleadings.* Sprint and CompTel request that BOCs explain the effect of ONA tariffs on the ratcheting of DS3 circuits, [46] and meet point billing arrangements with LECs not subject to ONA requirements. Sprint Petition at 14-15; CompTel Petition at 8. Several BOCs respond that they expect ONA to have no effect on ratcheting special access services. Pacific Bell Reply at 25-26; BellSouth Reply at 43-44; Southwestern Bell Reply at 38-39. BellSouth believes that the Ordering and Billing Forum (OBF) has found that existing meet point billing arrangements will continue to work in an ONA environment. BellSouth Reply at 43-44. Southwestern Bell and Pacific Bell claim that only their transport services are meet point billed, and because they have unbundled only local switching, there is no effect on meet point billing. Pacific Bell Reply at 25; Southwestern Bell Reply at 38.

69. *Discussion.* Neither petitioner has shown that the ratcheting and meet point billing practices of the BOCs are likely to be unreasonable under ONA. Therefore, Sprint and CompTel contentions on this subject present no issue that warrants investigation at this time.

B. "Flagging" Issues

70. *Pleadings.* MCI asserts that the lists of which BSEs are to be purchased by BOC affiliates (i.e., the 'flagged' BSEs), specified as to form in the *ONA TRP Order,* are inconsistent. MCI Petition at 44-46. Pacific Bell and BellSouth contend that their affiliated ESPs will use intrastate business line service rather than ONA services, and so it is not necessary to flag any of their BSEs. Pacific Bell Reply at 26; BellSouth Reply at 19-20. NYNEX and Nevada Bell assert that they are prohibited from providing interstate services by the MFJ, and thus do not purchase BSEs from their interstate tariffs. NYNEX Reply at 29; Nevada Bell Reply at 17-18. Bell Atlantic claims that MCI's allegation regarding its flag chart resulted from uncertainty over whether carriers were required to place both interstate and intrastate BSEs in their flag charts, or only interstate BSEs. Bell Atlantic includes a revised flag chart indicating both intrastate and interstate BSEs. Bell Atlantic Reply, App. A, Item 4.

71. *Discussion.* We have reviewed the flag charts of the BOCs cited by MCI, and those BOCs' replies. We conclude that the revised flag chart Bell Atlantic submitted in its reply is in compliance with the Commission's Rules and the *ONA TRP Order.* [47] In addition, NYNEX, Nevada Bell, and Pacific Bell have persuaded us that their ESP affiliates will use intrastate business line service rather than any BSEs, and thus no flagging is required.

C. Jurisdictional Concerns

72. *Pleadings.* D.C. PSC believes Bell Atlantic's ONA tariff results in federal regulation of intrastate rates, in violation of Section 2(b)(2) of the Communications Act, 47 U.S.C. § 152(b)(2). D.C. PSC argues that several Bell Atlantic BSEs appear in Chesapeake and Potomac's (C&P's) intrastate tariffs under D.C. PSC's jurisdiction. D.C. PSC Petition at 2-3. D.C. PSC states that the rates in Bell Atlantic Transmittal No. 471 are lower than those on file with D.C. PSC, and claims that Bell Atlantic expects 116 million minutes of use (MOUs) to shift from the intrastate to the interstate jurisdiction. D.C. PSC Petition at 3-4, *citing* Bell Atlantic D&J at 5-3, 5-4. D.C. PSC maintains that Bell Atlantic cannot differentiate between interstate and intrastate usage for many BSEs, and therefore must rely on percent interstate usage (PIU) reports from ESPs. [48] D.C. PSC asserts that different rates at the interstate and intrastate levels create an incentive for ESPs to skew their PIU reports in favor of the jurisdiction in which their rates would be lower. D.C. PSC Petition at 4. D.C. PSC argues that such "tariff shopping" opportunities imply that FCC ONA regulations are not limited to interstate services, in violation of *Louisiana PSC v. FCC,* 1 [49] and limits D.C. PSC's ability to require crosssubsidization of residential rates, or to promote universal service. D.C. PSC Petition at 5-6. In reply, Bell Atlantic explains that ESPs are not permitted to use interstate tariffs to provide intrastate services, and so the shift of traffic from the intrastate to the interstate jurisdiction feared by D.C. PSC cannot occur. Bell Atlantic also states that it assumed some interstate ESPs that now use intrastate service will choose to shift to interstate tariffs, not that jurisdictionally intrastate traffic will shift to the interstate jurisdiction. Bell Atlantic Reply, App. A, Item 14.

73. *Discussion.* Bell Atlantic correctly observes that ESPs are not permitted to use interstate BSEs in the provision of intrastate services, and thus it is unlikely ONA will lead to any shift in jurisdictionally intrastate traffic to the interstate jurisdiction. To the extent that differentiating between intrastate and interstate BSE usage involves technical constraints, or possible tariff shopping, the Commission considered these issues in the *Part 69 ONA Order,* as D.C. PSC notes in its petition. [50] D.C. PSC has renewed those contentions in its pending petition for partial reconsideration in that proceeding. It would be inappropriate to consider these issues, and the related contention that the D.C. PSC has been usurped by federal regulation, in the context of this tariff proceeding.

D. Customer Network Reconfiguration

74. *Pleadings.* MCI asserts that Pacific Bell has not acted consistently with the functional unbundling concept of ONA by stretching the definition of BSE to include a service, Customer Network Reconfiguration (CNR), rather than just central office features and functions. According to MCI, Pacific Bell has also violated Section 61.54(j) of the Commission's Rules, 47 C.F.R. § 61.54(j), by failure to provide any provisioning description or technical inter-

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[46] Ratcheting refers to providing discount rates for high capacity service where the customer uses less than the full capacity of the facility.

[47] *ONA Further Amendments Order,* at paras. 60-61.

[48] D.C. PSC claims that Bell Atlantic cannot base PIU estimates on BSA usage, because ESP usage is not likely to be similar to IXC usage. D.C. PSC Petition at 4-5.

[49] Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986).

[50] *See Part 69 ONA Order,* 6 FCC Rcd at 4535-36.

connection specifications for interstate CNR. 3 [51] MCI Petition at 47. In addition, MCI alleges that Pacific Bell's intrastate CNR involves transporting messages across LATA boundaries, and assumes Pacific Bell will provide interstate CNR in the manner that its disputed intrastate CNR service is being provisioned. MCI Petition at 46-48. In addition, MCI argues the CNR service is not an "official service" permitted to be transported by BOCs across LATA boundaries under the terms of the Modified Final Judgment (MFJ). MCI has filed a complaint with the Department of Justice asserting that the CNR violates Section II(D) of the Decree, and Department of Justice has stated it will investigate whether CNR violates the decree. MCI Petition at 48. In reply, Pacific Bell notes that CNR is listed in its approved ONA Plan, and claims that its intrastate service no longer allows customer connections to mechanized processors. Pacific Bell Reply at 8 n. 19.

75. *Discussion.* CNR was an approved BSE in Pacific Bell's ONA Plan. In addition, we have reviewed Pacific Bell's tariff language regarding CNR, and find no apparent violation of Section 61.54(j) of the Commission's Rules. Therefore, MCI has not posed a question that warrants investigation. [52]

E. Other Issues

76. *Pleadings.* Several petitioners contend that only three of 41 BSEs will be offered by all BOCs, and that this non uniformity will restrict the availability of some enhanced services to end users. [53] AT&T Petition at 3-5; CompTel Petition at 6; MCI Petition at 20-21; GSA Petition at 3-4; ANPA Petition at 4-7; MCI Petition at 12-13; Metromedia Petition at 20. The BOCs argue that the Commission requires them to file tariffs for BSEs listed in their ONA Plans, not to make their ONA offerings uniform. BellSouth Reply at 8-9; US West Reply at 4-5. Several BOCs also maintain that the comparisons of tariffs of different BOCs are not relevant to whether their initial BSE rates are lawful. BellSouth Reply at 13-14; Pacific Bell Reply at 3; US West Reply at 2-3.

77. Some petitioners claim that the optional features associated with some BSAs are inconsistent with the BOCs' ONA plans, and request that these features be unbundled as BSEs. [54] AT&T Petition as 7-9; Allnet Petition at 3-4; MCI Petition at 11-12. Metromedia argues that the BOCs have not unbundled all the BSEs which are technically feasible to unbundle. [55] Metromedia Petition at 5-6. The BOCs assert that the *Part 69 ONA Order* required them to tariff only BSEs that were included in their approved ONA plans, and that this is not an appropriate forum to request additional unbundling. Southwestern Bell Reply at 8-13; Pacific Bell Reply at 3-7; Nevada Bell Reply at 4-5; Pacific Bell Reply at 6-7; BellSouth Reply at 8-9; Bell Atlantic Reply, App. A, Item 3, at 1.

78. A few petitioners request that the Bureau either postpone the time at which feature group services are eliminated, or keep feature group services available indefinitely. [56] Sprint Petition at 3-5, 7-8; *see also* CompTel Petition at 7-8; WilTel Petition at 3; Metromedia Petition at 11-13; MCI Petition at 810. In reply, Southwestern Bell and Bell Atlantic contend that retention of two billing systems would be burdensome for BOCs. Bell Atlantic Reply, App. A, Item 3, at 1; Southwestern Bell Reply at 35-36. BellSouth observes that the issue of phasing out of feature groups is pending before the Commission in petitions for reconsideration, and argues that those petitions

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[51] According to MCI, Pacific has also violated Section 61.74 of the Commission's Rules by referencing technical publications. MCI Petition at 42. Pacific Bell states that it will remove the references to technical publications. Pacific Bell Reply at 26. Thus, MCI's argument is moot.

[52] The Commission has often stated that arguments based on the MFJ are properly raised in front of the MFJ court rather than here. "Compliance with MFJ criteria is not one of the standards that we shall require an access tariff to satisfy. Compliance or noncompliance is an issue to be resolved by the Court." BellSouth Telephone Companies, 5 FCC Rcd 7007 n. 3 (Com.Car.Bur. 1990). *See also* American Telephone and Telegraph Co. 94 FCC 2d 545, 550 n. 9 (1983); Ohio Bell Telephone Co., 1 FCC Rcd 942, 944 (1986).

[53] Many petitioners also complain that some BOCs failed to tariff services declared as BSEs in their ONA Plans, or that the BOCs did not tariff operations support systems (OSS) services that they incorrectly believe were required by the *BOC ONA Reconsideration Order*. The issues regarding BSEs specified in the plans but not tariffed were resolved in a separate Bureau Order. Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Subelements for Open Network Architecture, Filing and Review of Open Network Architecture Plans, CC Docket Nos. 89-79, 88-2, DA 92-120, released January 31, 1992 (Com.Car.Bur.). The Commission considered arguments regarding OSS services in Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, FCC 91-382, released December 19, 1991, at paras. 45-49. ONA OSS requirements are the subject of several petitions for clarification and reconsideration of the *BOC ONA Amendment Order*, 5 FCC Rcd 3103 (1990). AT&T asserts that none of the BOCs except Ameritech have filed tariffs for dedicated network access lines (DNALs), and claims that certain tariffed BSEs will not be available from other BOCs until they establish DNALs as BSA alternatives. AT&T Petition at 7-9. Since AT&T filed its petition, the BOCs filed petitions for waiver to file DNAL tariffs. *See* Petitions for Waiver of Part 69 of the Commission's Rules, Dedicated Network Access Lines, Open Network Architecture, DA 92-119, released January 30, 1992 (Com.Car.Bur.).

[54] Allnet also argues that the BOCs have not shown that there are distinguishable costs associated with ANI, and, therefore, ANI should not be unbundled. Allnet Petition at 5. Allnet raised this issue in the *Ameritech ONA Tariff Order*, where the Bureau concluded that this issue was not a sufficient basis on which to initiate an investigation. Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2, Open Network Architecture, DA 911633, released December 27, 1991 (Com.Car.Bur.) at para. 14. We see no reason to reconsider this conclusion at this time.

[55] Metromedia cites the Expanded Interconnection proceeding as providing progress in the requirement of collocation that is similar to the requirement of unbundling BSAs. Metromedia Petition at 5-6. *See* Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Notice of Proposed Rulemaking, 6 FCC Rcd 3259 (1991) (*Expanded Interconnection Rulemaking*). BellSouth asserts that the Commission has rejected arguments that BOCs be required to unbundle BSAs, and that it would be inappropriate to impose such a requirement based on tentative proposals in other proceedings. BellSouth Reply at 9-10.

[56] NYNEX asserts that the transition to unbundled offerings for ESPs should proceed as scheduled, but agrees that it may serve the public interest to make IXC conversion by July 1993 voluntary, and that BOCs not be required to eliminate bundled trunkside feature groups. NYNEX also recommends that the Commission re-examine the issue of whether feature group offerings should be eliminated. NYNEX Reply at 22-24.

for reconsideration are not reason for suspension or rejection. BellSouth maintains that its ONA tariffs comply with the Commission's Rules. BellSouth Reply at 6-8; *see also* Southwestern Bell Reply at 16.

79. Ad Hoc criticizes residually pricing BSAs, because such pricing retains the historical subsidies and other cost misallocations embedded in feature group rates. Ad Hoc also claims that residual pricing forces BSA rates to be too high, thus discouraging ESP demand for ONA services. Ad Hoc Petition at 24-25. BellSouth asserts that Ad Hoc criticizes residual pricing of BSAs, and notes that residual pricing was mandated by the Commission. BellSouth Reply at 9-10.

80. CompTel complains that cost-based, revenue neutral pricing for BSEs removes incentives for arbitrage *vis-a-vis* bundled offerings, thereby reducing the utility of ONA to small IXCs. CompTel Petition at 7-8. Allnet argues that the ONA tariffs should be suspended until the issues raised in petitions for reconsideration of the *Part 69 ONA Order* and Sprint's motion for stay are resolved. Allnet Petition at 2-3. WilTel complains that IXCs were not given adequate notice that they would be required to use ONA services. WilTel Petition at 2.

81. Sprint argues that ONA will probably not lead to increased demand for access services, either by IXCs or ESPs, because ESPs will continue to use intrastate business services, and IXCs are expected to subscribe only to the BSE features they used as part of a feature group. Sprint argues that the flow through of the BOCs' costs of unbundling could lead to higher access rates. Sprint Petition at 5-10; *see also* CompTel Petition at 9-10; Ad Hoc Petition at 25.

82. The BOCs contend that some arguments made by petitioners appear to be intended to delay ONA implementation rather than promote the analysis of ONA tariffs. These BOCs maintains that the issues underlying these arguments were resolved in other ONA proceedings and are not properly addressed in this tariff proceeding. Southwestern Bell reminds the Commission that these initial tariffs are merely the first step in an evolutionary ONA process. Southwestern Bell Reply at 1-2; *see also* BellSouth Reply at 2-5, 15; Nevada Bell Reply at 4-5.

83. *Discussion.* The petitioners raise issues which have been resolved in prior Commission Orders, or are nothing more than misplaced petitions for reconsideration of the *Part 69 ONA Order,* and thus present no issues which warrant delaying examination in this tariff investigation.

VI. CONCLUSION AND ORDERING CLAUSES

84. As our issue-by-issue review of the filings, petitions, and replies indicates, we believe that, in view of all the circumstances, these ONA tariffs sufficiently comply with Commission Rules and Orders so that they should generally be allowed to take effect. This compliance is sufficient to warrant denying petitions for rejection and requests for any extended suspension. Accordingly, the tariffs will become effective subject to further investigation and the protection of an accounting order. This action is taken pursuant to Section 204(a) of the Communications Act.

85. Accordingly, IT IS ORDERED, that the petitions for rejection or suspension and investigation of Bell Atlantic Telephone Companies, Transmittal Nos. 471, 475, and 487; BellSouth Telephone Companies, Transmittal No. 436; BellSouth Telecommunications Company, Revisions to Tariff F.C.C. No. 1, Transmittal No. 11; NYNEX Telephone Companies, Transmittal Nos. 57, 62, 68, and 76; Pacific Bell, Transmittal Nos. 1553, 1559, 1565, 1567; Nevada Bell, Transmittal Nos. 123, 124, 125, 126; Southwestern Bell Telephone Company, Transmittal Nos. 2145, 2146, 2154, 2155, 2159, and 2166; and US West Communications, Inc., Transmittal Nos. 206 and 225; filed by the parties listed in Appendix A of this Order, ARE GRANTED, to the extent provided herein.

86. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), an investigation is instituted into the lawfulness of the tariff revisions referenced above, and any future tariff revisions modifying those referenced above, filed by the Bell Operating Companies listed in Appendix A of this Order. We will designate the precise issues in this investigation in a future Order.

87. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the tariff revisions contained in the Tariff Transmittals referenced above ARE SUSPENDED for one day and an investigation of the referenced tariff transmittals IS INSTITUTED.

88. IT IS FURTHER ORDERED that the Bell Operating Companies listed in Appendix A of this Order SHALL FILE tariff revisions reflecting this suspension no later than 10 days from the release date of this Order. For these purposes, we waive Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, and assign Special Permission No. 92-97.

89. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), the Bell Operating Companies listed in Appendix A of this Order shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

90. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 4(j), and 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 204(a), that the Bell Operating Companies listed in Appendix A of this Order SHALL FILE cost support information as specified in this Order and the Commission's *Part 69 ONA Order,* no later than 10 days from the release date of this Order. The filing requirements for this information shall be those specified for the original ONA TRP filings in Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Tariffs, 5 FCC Rcd 5682, 5684, paras. 27-28, (Com.Car.Bur. 1991), and the material shall be filed as part of a revised ONA TRP reflecting all additional and corrected information. *See* Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Tariffs, 5 FCC Rcd 6131 (Com.Car.Bur. 1991).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

APPENDIX A

Parties Filing Petitions to Reject Or Suspend ONA Tariffs, November 26, 1991

Ad Hoc Telecommunications Users Committee (Ad Hoc)

Allnet Communication Services, Inc. (Allnet)

American Newspaper Publishers Association (ANPA)

American Telephone and Telegraph Company (AT&T)

Competitive Telecommunications Association (CompTel)

General Services Administration (GSA)

MCI Telecommunications Corporation (MCI)

Metromedia Communications Corporation (Metromedia)

Public Service Commission of the District of Columbia (D.C. PSC)

US Sprint Communications Company Limited Partnership (Sprint)

Williams Telecommunications Group, Inc. (WilTel)

Parties Filing Replies December 9, 1991

The Bell Atlantic Telephone Companies (Bell Atlantic)

The BellSouth Telephone Companies (BellSouth)

The NYNEX Telephone Companies (NYNEX)

Pacific Bell

Nevada Bell

Southwestern Bell Telephone Company (Southwestern Bell)

US West Communications, Inc. (US West) XXXX

Before the
Federal Communications Commission
Washington DC 20554

In the Matter of

Commission Requirements for Cost
Support Material To Be Filed with
Open Network Architecture
Access Tariffs

MEMORANDUM OPINION AND ORDER

Adopted: January 31, 1992; Released: January 31, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In a companion *Investigation Order* adopted today,[1] the Common Carrier Bureau commences an investigation of the initial Open Network Architecture (ONA) tariffs filed November 1, 1991 by the Bell Operating Companies (BOCs),[2] and consolidates that investigation with the previously established investigation of the Ameritech ONA tariff.[3] The present Order specifies procedures for the further examination, both by an independent auditor and by parties to the ONA tariff investigation, of proprietary cost models and associated materials filed in support of those tariffs, and for the subsequent consideration of these parties' analyses and comments in the investigation.

2. The ONA tariffs all rely on computer models to apportion the investment represented by central office switching equipment between the multiple switch functions used to provide unbundled services. The computer models, in 'turn, are intimately dependent upon competitively sensitive materials furnished by switch vendors to Bellcore,[4] which maintains and licenses the Switching Cost Information System (SCIS) model used by all but one of the BOCs.[5]

3. The Commission's established practice is to require public filing ofcost support for tariffs.[6] In the ONA context, the Bureau has sought from the outset to assure the fullest practicable access to these materials by entities that will use the unbundled ONA structure and services. Thus, the Bureau(TRP Order[7] that these models and related materials be fully disclosed as part of ONA tariff filings. The BOCs responded with petitions for waiver of the SCIS disclosure requirements of that Order, claiming that disclosure would both endanger proprietary Bellcore software and sensitive switch vendor materials, and ultimately obstruct the implementation of ONA (as switch vendors would decline to provide sensitive materials for use in such models rather than risk unprotected disclosure). These contentions were supported by Bellcore and the switch vendors.

4. The Bureau initially required a provisional, *in camera* submission by Ameritech of its SCIS materials, to enable an informed determination both of the asserted proprietary nature of the materials, and an improved understanding of their role in the carriers' ONA ratemaking process.[8] After *in camera* review of Ameritech's SCIS model and its role in ONA ratemaking, the Bureau determined that these materials are competitively sensitive and exempt from mandatory disclosure processes, as explained in the *SCIS In Camera Order*,[9] and required other BOCs to submit full SCIS materials for *in camera* review.[10] Although the *SCIS In Camera Order*

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[1] Open Network Architecture Tariffs, DA 92-128, released Jan. 31, 1992 (Com.Car.Bur.).

[2] The Bell Operating Companies are the operating companies of Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telephone Companies (BellSouth), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Pacific Bell and Nevada Bell (Pacific), Southwestern Bell Telephone Company (Southwestern), and US West Communications, Inc. (US West).

[3] Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2 (Open Network Architecture), DA 91-1633, Dec. 27, 1991 (Com.Car.Bur.).

[4] Bell Communications Research, Inc. (Bellcore) was created (originally under the name "Central Staff Organization") from the Bell Laboratories division of the unified Bell System at the time of divestiture, and is owned by the post-divestiture BOCs. United States v. AT&T, 552 F. Supp. 131, 142 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). The Commission has previously exercised authority over Bellcore through its jurisdiction over the BOCs. *See* Consolidated Application of AT&T and Specified Bell System Companies for Authorization Under Sections 214 and 310(d) of the Communications Act of 1934 for Transfers of Interstate Lines, Assignments of Radio Licenses, Transfers of Control of Corporations Holding Radio Licenses and Other Transactions as Described in the Application, Memorandum Opinion, Order and Authorization, 96 F.C.C. 2d 18 (1983). Thus, we do not consider Bellcore's assertions of interests warranting protection from disclosure as having any independent status beyond similar assertions by its owners.

[5] US West does not rely on SCIS for the development of BSE direct costs, but instead uses its own model, the Service Cost Model (SCM). Ameritech, in addition to SCIS, relies on a similar cost model, Common Channel Switching Cost Information System (CCSCIS), for the development of direct costs for the Remote Activation of Message Waiting--Expanded element. Hereafter, we use the term SCIS to refer to these and any other corresponding computer models used by BOCs to develop direct Basic Service Element (BSE) costs for ONA implementation.

[6] *See* 47 C.F.R. §§ 0.451(a), 0.455(b)(11); 47 C.F.R. §§ 61.38, 61.49.

[7] Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, Order, 6 FCC Rcd 5682 (Com.Car.Bur. 1991) (*TRP Order*), *pet'n for clarification or recon. pending.*

[8] Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs (Ameritech In Camera Submission), Order, DA 91-1309, Oct. 18, 1991 (Com.Car.Bur.).

[9] Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs (In Camera Submissions), DA 91-1592, Dec. 23, 1991 (Com.Car.Bur.) (*SCIS In Camera Order*).

[10] Bell Atlantic, BellSouth, Nevada, Pacific, Southwestern, and US West filed copies of their SCIS materials on December 30, 1991. NYNEX filed its SCIS information on January 8, 1992

"determined that the full SCIS model and supporting documentation, as well as associated BOC materials and vendor data, should not be available for public inspection,"[11] that Order states that we "will determine questions relating to restricted access by active participants in this Commission proceeding in a subsequent Order."[12] This Order addresses that access question.[13]

II. BACKGROUND

5. The *Part 69 ONA Order* authorizes local exchange carriers to use a flexible, cost-based approach for pricing new, and newly unbundled, ONA services.[14] Under this standard, the Commission requires price cap carriers to support new service offerings with cost support that: (1) satisfies the net revenue test; (2) identifies the direct costs of the new service; (3) includes an appropriate level of overhead costs; and (4) provides ratios of direct unit cost to unit investment, and direct unit cost to unit price. These materials, especially (2) and (4), enable the Commission to evaluate the reasonableness of the resulting rates.[15]

6. The *TRP Order* describes specific data formats for basic cost, demand, and rate information to be submitted by BOCs filing tariffs that implement their Open Network Architecture (ONA) plans, including the direct costs associated with each Basic Service Element (BSE).[16] The development of BSE direct costs is in turn substantially dependent upon the Switching Cost Information System (SCIS) developed and maintained by Bellcore, and other, similar computer models used by the BOCs to apportion joint and common switching costs between individual BSEs. These models are complex assemblies of mathematical expressions which, in the aggregate, simulate the actual switch's operations and enable the division of its generic functions and attendant costs into specific features and functions provided as ONA elements. During the switch simulation process used to develop unit investment figures, the SCIS model operates upon technical and cost specifications of particular switch technologies, and several carrier-determined variables. BOC-defined applications of switch technologies thus generate a functional and cost model of the switch's actual operating characteristics.

7. The SCIS model itself consists of algorithms developed and maintained by Bellcore, but the accurate development of these algorithms, as well as the operation and revision of the software, necessarily entail reliance on input data supplied by the BOCs and switch vendors. SCIS outputs constitute investment figures oriented to the eventual replacement cost of the switch. These investment figures for specific switch types are then aggregated across the different switches in a carrier's study area to generate the BOC's direct costs for specific basic service elements. Direct costs are then used as a component in the BSE rate development process. Bellcore licenses the SCIS model to BOCs and some non-BOC exchange carriers, subject to confidentiality agreements.[17]

8. The *TRP Order* provided that carriers unable to furnish the data required by that Order could file applications for waiver.[18] On September 27, 1991, the Bell Operating Companies (BOCs) filed petitions for waiver of several aspects of the Bureau's *TRP Order*, including requests by all BOCs for waiver of filing requirements for SCIS. On October 4, 1991, American Telephone and Telegraph Company (AT&T), Ericsson Network Systems Inc. (Ericsson), MCI Telecommunications Corporation (MCI), and Northern Telecom Inc. (Northern Telecom) filed comments on the BOCs' waiver petitions, *infra*. In their petitions for waiver the BOCs contend that the SCIS model, as well as inputs to the model supplied by the BOCs and switch vendors, and output reports generated by SCIS cost studies, all constitute proprietary materials that should be withheld from public disclosure.

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with a Motion to Accept Late Submission of Materials for *In Camera* Inspection. NYNEX claims it was unable to comply with the *SCIS In Camera Order* because personnel needed to review the filing for completeness and accuracy were unavailable due to previously scheduled vacations or other personal reasons. Because the Bureau was able to begin our review of materials filed by other BOCs, and third parties were not prejudiced because they were not entitled to review this material, we grant NYNEX's motion.

[11] *SCIS In Camera Order* at para. 2.

[12] *Id.*

[13] Requests for waiver of the *TRP Order* requirements in several respects not involving issues of SCIS disclosure were resolved in earlier Orders. The *Ameritech TRP Waiver Order* resolved Ameritech's waiver requests not involving SCIS issues. *See* Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, Order, DA 91-1309, released Oct. 18, 1991 (Com.Car.Bur.) (*Ameritech TRP Waiver Order*) , Erratum, DA 91-1345, released Oct. 28, 1991. *See also* Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, Order, DA 91-1346, released Oct. 29, 1991 (Com.Car.Bur.) (*Non-SCIS TRP Waiver Order*). The scope of the present Order is limited to the SCIS model, and associated inputs and output reports. Although Ameritech's petition is summarized in the *Ameritech TRP Waiver Order* rather than here, we do consider Ameritech's arguments here.

[14] *Part 69 ONA Order*, 6 FCC Rcd at 4531, para. 38.

[15] In addition, the Order permits a carrier to include "risk premiums" the carrier believes it needs to supplement its rate of return for risky new services. *Id.* at 4531, paras. 42-44. Because BSEs unbundled from feature group arrangements will be offered as alternatives to those arrangements during the transition to a fully unbundled ONA rate structure, they constitute new offerings under price cap criteria. *Id.* at 4529, para. 25.

[16] The Commission specified the rate elements and corresponding cost support demonstration required to implement the BOCs' ONA plans in the *Part 69 ONA Order*. Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and Order, Order on Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991) (*Part 69 ONA Order*).

[17] NYNEX Petition at 2; *see also* Bellcore Memorandum at 1-2. Several of the BOCs attach to their waiver petitions a memorandum from Bellcore discussing the proprietary nature of SCIS. They also attach an affidavit from the Bellcore employee responsible for maintaining SCIS. *See* Bell Atlantic, NYNEX, and Pacific Petitions. Pacific relies on this memorandum and affidavit to demonstrate the proprietary and trade secret status of SCIS. Pacific Petition at 5. Southwestern incorporates the Bellcore memorandum, but does not refer to the specifics of that memorandum. Southwestern Petition at 3.

[18] *TRP Order* at para. 24.

9. Although we have determined that the SCIS model and inputs to the SCIS model should not be open to unrestricted public inspection,[19] such information must be made available to parties to the ONA tariff investigation to the maximum extent consistent with appropriate safeguards against competitive harm.[20] As one element in our bifurcated approach to SCIS disclosure, therefore, we require that BOCs provide their operational software packages to these parties, albeit with precautions in the form of redactions and a nondisclosure agreement that will protect switch vendors and the software's owners, the BOCs, against competitive harm. Proprietary BOC materials used as inputs to SCIS will also be disclosed to parties who sign the prescribed nondisclosure agreement.

10. The second element of our protected disclosure mechanis m is an independent audit of SCIS materials that are too competitively sensitive to disclose even under such nondisclosure arrangements. The algorithms actually constituting SCIS, as well as the technology-specific SCIS output reports and the BOC procedures used to aggregate these reports to study area scale, will be disclosed only to independent auditors, who must sign a separate nondisclosure agreement. Parties will, however, have the opportunity to submit questions for the independent auditor.

III. DISCLOSURE OPTIONS

11. The *SCIS In Camera Order* determined that the SCIS model and associated data from switch vendors constitute confidential materials exempt from disclosure under the FOIA and the Commission's implementing regulations. This Order considers the extent to which the public interest nonetheless supports disclosure of these materials in the exercise of agency discretion, and methods by which adverse effects from disclosure can be avoided or minimized. In the present context, no purpose would be served by repeating the arguments made in the BOCs' waiver requests for categorical nondisclosure of these materials. Instead, we summarize the carriers' proposed alternatives for protected or limited disclosure, and arguments for disclosure raised by their opponents, as these contentions bear on the exercise of our discretionary disclosure authority.

A. BOC Waiver Proposals

12. Various BOCs suggest alternative approaches to filing their SCIS model on the record. Bell Atlantic and BellSouth claim that providing a detailed description and explanation of SCIS for the public record should satisfy Commission cost support requirements.[21] Bell Atlantic agrees to respond to questions from the Commission staff regarding these materials.[22]

13. In their oppositions, MCI and AT&T find unacceptable all of the alternative approaches to review of SCIS suggested by the BOCs.[23] MCI argues that none of the BOC proposals allows access customers the ability to review the inputs, algorithms, and outputs of the cost models used to derive the rates that they will pay.[24] Specifically, MCI claims that with respect to Ameritech Transmittal 557, MCI found nonproprietary descriptions useless for rate review and asserts they do not satisfy the *TRP Order*. MCI contends that the BOCs do not indicate that they will provide extension of this information.[25] AT&T further claims that the Commission must also protect the public interest by assuring that the ONA tariffs are cost based, just, reasonable, and nondiscriminatory. AT&T argues that the alternatives proposed by the BOCs do not strike an appropriate balance between proprietary interests and public interests because they would significantly diminish or preclude the Commission's access to and use of information concerning the operations of the models and their results.[26] AT&T concludes that the BOCs fail to demonstrate that their alternative proposals will correct the serious deficiencies in their tariff support caused by the failure to furnish cost models.[27]

14. Several BOCs offer to conduct seminars for Commission staff that would explain the theory and operation of SCIS software and related algorithms.[28] The carriers suggest various approaches to demonstrating SCIS. BellSouth and US West agree to include the use of data from their filings in their respective demonstrations.[29] NYNEX and Southwestern would include demonstrations of SCIS results using fictitious data. However, the Commission would have the opportunity to request the carriers to process data contained in their filings in the presence of Commission staff.[30]

15. Bell Atlantic states that its workshop could involve actual input data from its ONA tariff filing, but would avoid the disclosure of confidential vendor information.[31] To avoid creating an agency record that might involve FOIA, US West states that it will leave no software, documentation, or demonstration results with the Bureau's staff.[32] Bell Atlantic and US West express a willingness to organize additional workshops for third parties using prototype data.[33] Bell Atlantic notes that such workshops have been conducted in connection with state commission proceedings and have been well received.[34] US

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[19] *SCIS In Camera Order, supra.*

[20] The Bureau informally encouraged the BOCs and petitioners to pursue an informal negotiation process to afford intervenors access to these materials under procedures to protect proprietary materials. BOCs and petitioners did not reach an agreement on how to accommodate their diverse interests in disclosure.

[21] Bell Atlantic Petition at 4; BellSouth Petition at 8.

[22] Bell Atlantic Petition at 4.

[23] AT&T has submitted comments only as an interexchange carrier, not in its role as a switch vendor.

[24] MCI Comments at 3.

[25] MCI Comments at 3-4.

[26] AT&T Comments at 5.

[27] AT&T Comments at 6.

[28] Bell Atlantic Petition at 5; BellSouth Petition at 7; NYNEX Petition at 5, n. 7; Southwestern Bell Petition at 4. Such seminars or demonstrations have been provided in several state proceedings.

[29] BellSouth Petition at 7-8; US West Petition at 7.

[30] NYNEX Petition at 5, n.7; Southwestern Bell Petition at 4.

[31] Bell Atlantic Petition at 5; *see also* NYNEX Petition at 5, n.7; Southwestern Bell Petition at 4.

[32] US West Petition at 7. The Trade Secrets Act, argues US West, prohibits the Bureau's staff from disclosing any proprietary information obtained during a workshop.

[33] Bell Atlantic Petition at 5; US West Petition at 7.

[34] Bell Atlantic Petition at 5.

West would require intervenors to execute appropriate protective agreements.[35] Ericsson agrees to formulate "dummy" data for use in a workshop on SCIS and SCM for the Bureau or intervenors (or both).[36] AT&T, however, argues that the workshop option is inadequate because the BOCs would use fictitious data rather than the information actually used by the carriers to develop their rates.[37]

B. Commenters' Reactions

16. Ericsson urges the Bureau to consider the alternatives to a filing on the record that were proposed by many of the BOCs. Ericsson offers support and cooperation for any alternative that prevents disclosure of Ericsson proprietary information.[38] Northern Telecom agrees to consider specific proposals for public disclosure of information related to SCIS and SCM if the Commission establishes appropriate protections for the use and disclosure of the company's confidential and proprietary information.[39]

17. Northern Telecom reminds the Commission that it entered into written confidentiality agreements with Bellcore and US West to prevent disclosure of its confidential and proprietary information.[40] Furthermore, Northern Telecom claims that it would reevaluate providing information to Bellcore and US West if the information becomes public. According to Northern Telecom, it has no obligation to continue to supply this information.[41] According to several carriers, the SCIS model cannot function without such vendor-provided information.[42]

18. The reason for its concern regarding the confidentiality of pricing data, explains Ericsson, is that the BOCs award virtually all major purchases and projects through competitive sealed bids. In addition, claims Ericsson, the highly competitive nature of the central office and switching equipment market leads to narrow profit margins and magnifies the significance of pricing and pricing strategies in this market.[43] Northern Telecom explains that with its proprietary information, competitors would have detailed, non-public price and technical information concerning the company's current and planned switching products.[44]

19. Ericsson also argues that because BOCs make most of their switch purchases through competitive, sealed bids, knowledge of a competitor's pricing allows a company to bid slightly under its competitors, but maximize the company's profits.[45] Northern Telecom explains that a competitor with detailed, non-public price and technical information concerning the company's current and planned switching products would be able to determine the costs of specific interface types and service types on each of the company's central office switching systems, and the competitor could modify its pricing structure accordingly.[46]

20. MCI asserts that it would agree to review of SCIS and SCM model inputs, algorithms and settings, and outputs used to derive ONA rates subject to a protective order and nondisclosure agreement with the BOCs. MCI requires that it perform the review at its own designated location, but the carrier expresses a willingness to limit the review to a select number of MCI employees. MCI suggests that the BOCs could deliver the material to a designated MCI location after execution of nondisclosure agreements and retrieve the material after the Commission releases a final Order.[47] Similarly, AT&T contends that the BOCs could provide all general processing algorithms, outputs and a full description of the methodology through which their models develop unit costs for service features but not any vendor-specific input data and algorithms used in the models. AT&T Comments at 6-7. AT&T points to the nondisclosure agreements between Bellcore and US West and switch manufacturers, and asserts that intervenors can assess the validity of the BOCs' cost methodologies without vendor proprietary information. AT&T suggests that the Commission prescribe a protective order restricting the use of the data solely to the ONA proceeding. Access to this data would also require a nondisclosure agreement. AT&T contends "any pleadings that disclose information accorded confidential status under the protective order should be filed with the Commission under seal as provided for in Section 0.459 of the Commission's rules, 47 C.F.R. § 0.459." AT&T Comments at 7.

C. BellCore Proposal

21. The Bureau on November 19, 1991 informally requested Bellcore and the BOCs to seek a negotiated solution to these disclosure issues. Bellcore circulated to petitioners on December 13 a letter suggesting two mutually exclusive alternatives for protected SCIS disclosure -- an independent audit or limited, on-premises access to the SCIS software by parties willing to sign a nondisclosure agreement (which is not furnished in the December 13 letter).[48] Under the first of the two mutually exclusive Bellcore options, assuming a majority of petitioners con-

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[35] US West Petition at 8.
[36] Ericsson Comments at 9.
[37] AT&T Comments at 5-6.
[38] Ericsson Comments at 9.
[39] Northern Telecom Comments at 5-6.
[40] Northern Telecom Comments at 4-5; *see also* Bell Atlantic Petition at 3; BellSouth Petition at 4; NYNEX Petition at 3. Bell Atlantic and US West claim that if they disclosed vendor information to the public, Bellcore would by their action be in violation of contractual obligations to protect the confidentiality of the vendors' data. Bell Atlantic Petition at 3; US West Petition at 6.
[41] Northern Telecom Comments at 5; *see also* Ericsson Comments at 9.
[42] Bell Atlantic Petition at 3; US West Petition at 6; Bell Atlantic Petition at 4; BellSouth Petition at 5.
[43] *Id.* at 5-6.
[44] Northern Telecom Comments at 4.
[45] Ericsson Comments at 5.
[46] Northern Telecom Comments at 4.
[47] MCI Comments at 5.
[48] US West was not a party to the Bellcore December 13 Letter. Rather, US West developed a separate proposal for disclosure of its SCM model. Letter from A. Lim, US West, to Chief, Common Carrier Bureau, December 19, 1991. US West's proposal is in all substantive respects identical to the Bellcore proposal, and MCI's and Sprint's responses are in all substantive respects identical to their responses to Bellcore's proposal. Letter from L. Blosser, MCI, to A. Lim, US West, December 18, 1991; Letter from L. Kastenbaum, Sprint, to A. Lim, US West, December 18, 1991. AT&T discussed its opposition to SCM in its letter regarding SCIS.

sent, an auditor would be selected by Bellcore and (tentatively) accorded access to proprietary vendor data. Bellcore apparently contemplates that such consent should be binding on other parties. The auditor would then review the model's procedures, evaluate inputs and outputs, and perform sensitivity analyses.

22. The second Bellcore option, limited on-site SCIS review, arises as an alternative only if a majority of petitioners do not accept the audit proposal. In that event, Bellcore would provide three persons designated by each petitioner a maximum of three days' access to SCIS at the BOC premises. The SCIS model and documentation would be redacted of vendor data, unless the vendors agreed to provide such data on the strength of nondisclosure agreements reached with individual petitioners. (No such agreement is provided as part of the proposal to which petitioners are asked to respond.) The BOC employees would conduct SCIS runs, under specifications submitted by petitioners three days in advance. Bellcore candidly states it cannot predict what vendors will agree to in their negotiations with petitioners should this approach be adopted.

23. AT&T and MCI both responded that Bellcore's audit proposal provides inadequate access to the SCIS model.[49] MCI criticizes the BOCs' delay in submitting a proposal long after MCI requested on-site inspection of SCIS. MCI objects to the proposal because if a majority of petitioners elect the independent audit option, all petitioners will be precluded from on-site review. MCI states that it finds an independent audit unacceptable under any circumstances, and also considers Bellcore's proposal for on-site review unacceptable. AT&T suggests that the BOCs allow on-site review as a supplement to any auditor report. The auditor's report, argues AT&T, should include the BOCs' unit switching costs for each study area for each type of switching technology, aggregated for switch vendors. According to MCI, an acceptable on-site review would allow for two visits - one to review documentation and BOC inputs, and the other for MCI to provide its own input data for sensitivity analyses. Sprint refuses to allow its rights to review SCIS to be determined by a majority vote of other interested parties. Allnet questions whether SCIS contains any trade secret information, given that Bellcore has not sought any patent or copyright protection. Alternatively, D.C. PSC responds to Bellcore's proposal by voting for the limited on site review alternative.[50]

D. State Proceedings

24. Several BOCs also attach illustrative nondisclosure agreements, employed to enable review of SCIS in state ratemaking proceedings, to their petitions for waiver of the *TRP Order*. After an initial review of the complexity of Ameritech's SCIS materials, the Bureau desired more information concerning the practice of state public utility commissions in dealing with ratemaking based on SCIS. The Bureau requested that each BOC file supplemental materials describing the extent and method of SCIS disclosure in state proceedings, and the BOCs filed this information on November 13, 1991.[51]

25. These supplemental materials show that BOCs have not provided what they consider proprietary SCIS information to state regulators absent a protective order or nondisclosure agreement.[52] State public utility commissions requested and received a variety of SCIS information. Some state commissions had access to the SCIS model and full documentation.[53] In addition, in one state proceeding an apparently extensive, independent audit was conducted of the internal validity of Pacific's SCIS model; because the audit was conducted under a rigorous protective order and nondisclosure agreements, however, the regulatory authority's public report of the audit to the California state legislature was essentially devoid of descriptive detail.[54] Other state commissions saw only redacted versions of the model, stripped of the specific carrier or vendor data necessary to track the rate development process; portions of the documentation; or some type of summary overview of the model.[55]

26. Third party intervenors at the state level have received varied access to SCIS in the form of written materials and presentations. This ranges from a presentation by Bellcore on behalf of NYNEX, which was limited to written materials prepared by Bellcore, to disclosure of the SCM model and documentation by US West in Oregon. In the latter instance, the Oregon Public Utility Commission (PUC) granted a blanket protective order and third parties were required to sign a nondisclosure agreement.[56] In general, third parties received more limited access to SCIS documentation and related materials than state commissions.[57]

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[49] *See* Letter from L. Blosser, MCI to J. Britt, Bellcore, December 18, 1991. Letter from T. Norris, AT&T to Chief, Common Carrier Bureau, December 18, 1991. *See also* Letter from L. Blosser, MCI to S. Wiggins, FCC, December 17, 1991; Letter from M. Yourshaw, ANPA, to Chief, Common Carrier Bureau, December 23, 1991 (opposing both Bellcore alternatives and supporting MCI's counterproposal); Letter from P. Rohrbach, WilTel, to Chief, Common Carrier Bureau, December 20, 1991 (opposing both Bellcore alternatives and supporting AT&T's and MCI's counterproposals); Letter from L. Kastenbaum, Sprint, to J. Britt, Bellcore, December 19, 1991 (opposing both Bellcore alternatives); Letter from R. Morris, Allnet, to Chief, Common Carrier Bureau, December 23, 1991 (opposing both Bellcore alternatives).

[50] Letter from D. Avery, General Counsel, D.C. PSC, to J. Britt, Bellcore, December 17, 1991.

[51] These submissions are cited as "Reports," *i.e.*, Bell Atlantic Report at --.

[52] The Florida Public Utilities Commission has not yet ruled on a BellSouth motion of confidentiality in one of its proceedings.

[53] *See* Ameritech Report, Pacific Report, Southwestern Bell Report, and US West Report.

[54] *See* Pacific Report.

[55] *See* Bell Atlantic Report at 1-2, NYNEX Report at 1-2, Southwestern Bell Report at 1, US West Report at 3.

[56] NYNEX Report at 2; US West Report at 2.

[57] *See generally* Reports of Ameritech, NYNEX, Southwestern, and US West.

IV. DISCUSSION

A. Discretionary Agency Disclosure: Legal Authority

27. Because BSE rates are developed by the allocation of switching equipment capacity and costs at a level of specificity that entails reliance on proprietary data in the form of computer models, the investigation of BSE rates requires that we address two competing but fundamental policies. On one hand, access to relevant information enables interested persons to participate fully in a Section 204 investigation. On the other hand is the long-protected interest in maintaining the private, confidential status of commercial and financial information, including trade secrets.[58] Having determined in the *SCIS In Camera Order* that the model and related materials are categorically exempt from disclosure under FOIA, we now address this inherent dilemma from the perspective of discretionary agency disclosure.[59]

28. The courts have required that agencies contemplating discretionary disclosure of competitively sensitive materials first consider (1) whether disclosure of the detailed information will aid the discharge of the agency's functions; (2) the extent of harm to the public, as well as information submitters, from the release of competitively sensitive materials; and (3) whether less extensive disclosure may provide the public with adequate knowledge, while protecting proprietary information.[60]

29. Thus, the Bureau must make several sequential determinations before assertedly proprietary materials may be disclosed. As to the materials exempt from mandatory FOIA disclosure, a determination must be made whether public interest considerations argue for the exercise of the Commission's discretionary disclosure authority. This requires that we determine the extent and specific manner in which ONA ratemaking is dependent on SCIS and related materials, and what detriments to the public interest arise from less than the customary disclosure of such materials. If these public interest considerations are significant, we must next weigh the harm that could accrue to public and private interests from disclosure against the public interest in access to the materials. This would enable the Bureau to consider if some form of discretionary disclosure is warranted, notwithstanding a determination of proprietary status, and if so, how best to accomplish a useful degree of disclosure without unduly compromising the proprietary materials involved.[61] The determination whether and how to provide some form of access to the materials will thus depend both on this weighing of interests, and the practicability of various alternatives by which the materials to be disclosed may be "redacted" or otherwise partitioned to reconcile these conflicting interests.[62]

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[58] *See, e.g.*, Trade Secrets Act, 18 U.S.C. § 1905; Freedom of Information Act, 5 U.S.C. § 552.

[59] We use the term "competitively sensitive" rather than "proprietary" or "trade secret" in the discussion because, as explained in the *In Camera Order*, we have determined the SCIS materials involved are exempt from mandatory FOIA disclosure under two distinct, separately conclusive grounds: (1) the language of the statute, which exempts trade secrets and proprietary materials, and (2) judicial interpretations that recognize the anticipated harmful effects of disclosure on agency functions as an independent ground for exemption.

[60] Pennzoil Company v. FPC, 534 F.2d 627, 631-32 (5th Cir. 1976) (*Pennzoil*).

[61] Examination of the SCIS model's use in the context of a specific carrier's ratemaking process has assisted our determination whether disclosure of SCIS would significantly impair agency functions, such that elements of SCIS or related materials not competitively sensitive should be exempted from mandatory FOIA disclosure on this ground. *See, e.g.*, Critical Mass Energy Project v. NRC, 931 F.2d 939, 944 n.5 (D.C. Cir. 1991); 9 to 5 Organization for Women Office Workers v. Board of Governors, 721 F.2d 1, 9 (1st Cir. 1983).

[62] *See* Board of Trade of the City of Chicago v. Commodity Futures Trading Commission, 627 F.2d 392, 401-02 (D.C. Cir. 1980).

B. Public Interest Considerations

1 General

30. Cost support materials filed with tariffs are routinely available for public inspection under the Commission's Rules,[63] and the Commission has departed from this practice only with great reluctance. The few departures from routine disclosure have tended more toward effecting disclosure, under safeguards for proprietary material,[64] than toward the categorical denial of public access.[65] This practice comports with both the Administrative Procedure Act's fundamental interest in administrative decisions reached upon a public record, and the strong statutory preference for disclosure established by the FOIA. Indeed, the Commission's broad discretion to disclose sensitive materials was confirmed even before Congressional enactment of the FOIA. In the *Schreiber* decision,[66] the Supreme Court determined that:

> Grants of agency authority comparable in scope to § 4(j) [of the Communications Act] have been held to authorize public disclosure of information, or receipt of data in confidence, as the agency may determine to be proper upon a balancing of the public and private interests involved.

Schreiber, 381 U.S. at 291-92 (notes omitted).

31. Two decades later, in the context of the Shared Network Facilities Arrangement (SNFA) investigation, the Commission determined that inter-carrier SNFA contracts to which MCI sought access, while exempt from mandatory FOIA disclosure because they pose the risk of competitive harm, could be disclosed because relevant to the Commission's investigation of SNFA contracts and special access rates.[67] The Commission therefore directed the Office of General Counsel to impose a protective order that would prevent MCI, the party seeking access to confidential SNFA materials, from revealing that information to third parties or using it for competitive purposes.[68] Following a remand of that proceeding on other grounds, the Commission again determined to disclose additional contracts required to be filed by carriers under investigation.[69]

2 ONA-Specific Considerations

32. Paragraphs 42 and 44 of the *Part 69 ONA Order*, codified in Appendix A of that Order as revised Section 61.49(h) of the Commission's Rules, require carriers to develop direct costs for BSEs unbundled from local switching by applying a consistent cost methodology. The Order also requires the submission of supporting workpapers to establish the selected cost support methodology. So far as intervenors are concerned, however, the SCIS model appears to be an undisclosed set of technically complex and variable workpapers which have the capability to alter substantially the BSE rates through variations both obvious and subtle. As explained below, our *in camera* inspection generally confirms the intervenors' perspective.

33. The general considerations and past Commission practice favoring disclosure of tariff cost support materials are reinforced when, as here, the tariffs in question both implement a major Commission policy initiative, and establish rate benchmarks that will be used for the subsequent application of price cap regulation in the ONA context. As noted, the *Part 69 ONA Order* endorsed pricing flexibility for BOCs providing these newly unbundled elements, but also iterated the importance of sufficient, and adequately specific, cost support, both to avoid discriminatory and excess charges as well as the possibility of predatorily low pricing.[70]

34. The Bureau expects that disclosure of detailed SCIS materials, including BOC inputs and aggregated SCIS output reports, to parties to the investigation under nondisclosure safeguards would add significantly to the agency's understanding of the application of SCIS by the carriers charged with developing initial ONA rates. This judgment is based on our own *in camera* review of SCIS, which discloses its sensitivity to changes in BOC raw data inputs (cost of money, switch pricing, *etc.*) as well as certain parameter choices made by BOCs when actually running the model (*e.g.*, average or incremental costing), and on review of the other regions' ONA tariffs and petitions directed at them.[71]

35. At the same time, broad disclosure of these materials could obstruct or defeat the very purposes for which ONA was adopted. We are persuaded to this assessment of

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[63] 47 C.F.R. § 0.455(b)(11); 47 C.F.R. § 61.49.

[64] *See* 47 C.F.R. § 0.457(d), 47 C.F.R. § 0.461(c).

[65] *See* Western Union Telegraph Company and American Satellite Company, Requests for Inspection of American Telephone and Telegraph Company's Documents, FOIA Control Nos. 85-29 and 85-37, FCC 85-378, Memorandum Opinion and Order, released July 23, 1985 (*Western Union Order*); Commission Requirements for Cost Support Material To Be Filed with 1989 Annual Access Tariffs, 4 FCC Rcd 1662 (Com.Car.Bur. 1988) (*1989 TRP Order*); Annual 1989 Access Tariff Filings, Petitions for Waiver Regarding Proprietary Treatment of Information Contained in the 1989 Tariff Review Plan, 3 FCC Rcd 7200 (Com.Car.Bur. 1988) (*Confidentiality Order*). The LECs specifically objected to several TRP tables, including one that required total company cost analysis (including the removal of non-regulated costs and costs subject to separations), and a table that required interstate cost analysis, including the allocation of costs among access elements. *Confid entiality Order*, 3 FCC Rcd at 7200. *See also* AT&T Communications, Tariff F.C.C. No. 16, Request for Waiver of the Commission's Rules, 4 FCC Rcd 2426 (Com.Car.Bur. 1989) (*FTS 2000 Order*).

[66] Federal Communications Commission v. Schreiber, 381 U.S. 279 (1965) (*Schreiber*).

[67] MCI Telecommunications Corp., Memorandum Opinion and Order, FOIA Control No. 84-144, FCC No. 85-266, released May 17, 1985 (*MCI FOIA Order*).

[68] MCI Telecommunications Corp., Modified Protective Order, FOIA Control No. 84-144, FCC No. 85-266, released July 5, 1985 (*MCI Protective Order*).

[69] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, 4 FCC Rcd 687 (1989) (*SNFA Filing Requirements Order*).

[70] *Part 69 ONA Order*, 6 FCC Rcd at 4531.

[71] Petitioners addressing the November 1 tariffs observe that the unit investment and direct cost figures derived by individual BOCs, all relying on SCIS, vary substantially. The Ameritech unit investment for ANI, for example, is almost 20 times greater than that calculated by Southwestern Bell, for example. MCI Petition (Nov. 26) at 17. It is of evident importance to determine the extent to which such variations arise from SCIS, and to what extent they derive from other elements in the BOCs' rate development procedures.

risk not primarily by the substantial measures adopted by Bellcore to protect the confidentiality of its model, nor by the corresponding provisions in its licensing agreements. These, combined with other evidence, establish the proprietary nature of the materials involved, and the substantiality of competitive harm to SCIS, but not necessarily any overriding public detriment. Were the public interest sufficiently compelling, therefore, these concerns might not preclude a determination to disclose SCIS. Rather, we are concerned that the ultimate effect of disclosure would be to sacrifice the objectives that ONA seeks to implement.

36. The public disclosure of SCIS and related materials poses a substantial risk, both of competitive harm to the parties directly affected and of general harm to the public. With respect to switch vendors especially, it appears that disclosure of their inputs or technology-specific SCIS output reports would expose them to competitive harm in the switching system market, so that the probable effect of unguarded SCIS disclosure would be to terminate switch vendors' participation and quickly render the model useless. Even if switch vendors were able to continue their involvement with SCIS, broad disclosure of the model's fundamental algorithms would substantially reduce its value to Bellcore.

37. Of central import to the public, unrestricted disclosure of SCIS could seriously compromise or end the usefulness of SCIS and switch vendor information in ratemaking proceedings in both state and interstate jurisdictions. Such switch vendor information will probably be essential to develop any rates for ONA services that accurately reflect costs.

3 Conclusion

38. The *Ameritech TRP Waiver Order* describes the competing interests in disclosure of SCIS and the asserted proprietary nature of SCIS elements, as they appeared to us on the basis of wholly non-proprietary descriptions. The difficulty of reconciling these interests springs in large measure from the necessity of reliance on SCIS or a similar model to develop unit investment data for individual BSEs. Our subsequent *in camera* review of Ameritech's SCIS model (and later, of other BOCs' models) was undertaken to reach a betterinformed judgment of contentions that SCIS materials generally should be accorded confidential treatment, and so expedite ONA implementation.[72]

39. We have now concluded that SCIS should be subjected to the fullest practicable examination by parties to the investigation, consistent with protection of competitively sensitive materials, to assure thorough review of these elements of the ONA rate development process. There is a strong public interest, both generally in developing the new services to be furthered by ONA and, more narrowly, in the setting of reasonable prices for ONA services that will not constrain that process. The broad public purposes of the Commission's ONA initiative will unquestionably be far better served if prospective customers of these offerings are enabled to contribute their specialized expertise to the resolution of issues in the ONA tariff investigation. At the same time, while the potential providers of ONA services are well situated to contribute to this process, we are convinced that the effective initial implementation of ONA under reasonable rates and provisions, as well as the continued evolution of the ONA process, require that the SCIS model and related proprietary materials not be fundamentally compromised.

C. Bellcore Disclosure Proposal

40. A Bellcore proposal circulated December 13 attempts to resolve the difficulties arising from cost support premised on proprietary materials, but it exhibits several deficiencies. It is not clear from the Bellcore audit proposal whether the analysis performed would be technology-specific, or how petitioners could use the auditor's results to examine particular BOCs' rate development practices. The scope of the proposed Bellcore audit is also made contingent upon the switch vendors' subsequent determination whether to provide the auditor with proprietary information. The Bellcore audit approach thus seeks to limit any disclosure provided to individual parties to the scope of a majority determination, and fails to specify the terms of the agreement under which the audit will be disclosed. The on-premises inspection of SCIS proposed as a contingent, mutually exclusive alternative is also subjected to practical constraints that would seriously constrain parties' ability to review these materials. MCI has complained that the BOCs' proposal both represents an effort further to stall meaningful review, and sharply constrains the scope of on-premises SCIS trial runs.[73] We are concerned, as well, that the on-premises inspection alternative leaves the extent of vendor data disclosure to individual parties' negotiating skills.

41. Apart from its substantive deficiencies, the Bellcore proposal potentially sets petitioners against each other both on the initial choice between mutually exclusive alternatives, and then on secondary issues such as differential access to switch vendor data. The proposal to reduce administrative process to a majority vote between two choices crafted by the carriers' agent that petitioners oppose is not an arrangement the Bureau can endorse. Indeed, even the audit report described by Bellcore, when filed with the Commission under seal, would still not include any data considered proprietary by the vendors. This amounts to a less useful mode of disclosure for staff

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[72] Deferring consideration of these matters until all regions have submitted their ONA tariffs would only further delay the implementation of ONA, and review of multiple SCIS-based filings is not necessary to determine issues of public disclosure.... Our limited, immediate purpose is to acquire sufficient understanding of the SCIS model to determine whether its proprietary aspects can be effectively preserved, while still affording the interested public a useful opportunity to review the application of the model to these filings.

Ameritech TRP Waiver Order, paras. 13-14. The courts have generally preferred that agencies undertake such *in camera* review of materials subject to FOIA, especially in technically complex areas. *See* Lead Industries v. OSHA, 610 F.2d 70, 88 (2d Cir. 1988); Weissman v. CIA, 565 F.2d 692, 697 (D.C. Cir. 1977).

[73] Letter from L. Blosser, MCI, to S. Wiggins, Tariff Division, December 17, 1991.

review than the Ameritech *in camera* submission. We therefore turn to the practicalities of a balanced disclosure crafted to the circumstances of the major elements at issue -- switch vendor inputs; BOC inputs; the operational SCIS software, and documentation of its processing algorithms; and SCIS output reports.

D. Analysis of Discretionary Disclosure

42. We therefore seek to establish a disclosure procedure firmly committed to the maximum extent of public participation in the ONA tariff investigation that can be reconciled with adequate protection of proprietary materials. This determination reflects the interests in disclosure and the particular purposes sought by the ONA initiative, which include the determination by carriers formulating ONA plans of offerings expected to be useful to enhanced service providers and others. It has been substantially strengthened by our *in camera* review of SCIS in the Ameritech context, as well as preliminary review of the other BOCs' ONA filings.[74] Our *in camera* review of the SCIS model, considered both as a discrete rate development tool and as applied in the context of the BOCs' overall ONA rate development process, has confirmed the presence and importance of multiple decision points and data elements in the SCIS-based aspects of the cost development process, including: (1) BOC and switch vendor inputs to SCIS; (2) the algorithms constituting the model proper; and (3) variation in the operation (and results) of SCIS cost studies introduced by user-determined parameters. In the present context, we are free to explain this determination in detail only to the extent it can be described on the basis of non-proprietary materials, and have combined the explanation of these aspects of SCIS with our discretionary disclosure analysis.

1. Description of SCIS[75]

43. The precursor of the SCIS model was developed when the advent of computerized electronic switching systems to replace mechanical switching coincided with the need to price multiple new service offerings, and the increased regulatory emphasis on more open, competitive structures for both services and service providers. An increasingly dynamic telecommunications market required, both for efficient market strategy and for compliance with regulatory strictures, that carriers be able to apportion the cost of shared switching resources among a rapidly increasing, and evolving, menu of services. The current SCIS software model encompasses 25 software modules in order to apportion such investments for eight switching system technologies provided by five switch manufacturers.

44. For each switching technology, SCIS software modules replicate the internal operations of the several components in that particular vendor's line -- including central office switches, remote and tandem switching entities, and including ISDN and SS7 capabilities when provided. These software modules are not static; there have been over 30 SCIS software releases since 1985 to reflect new technologies, engineering rules, switching architectures, and feature or price revisions. Approximately 35 to 40 percent of the system code (*i.e.*, over a third of the 900, 000 or more lines in existence) must be revised on an annual basis.

45. To generate an investment figure for a specific BSE, the internal operations and architecture of individual vendors' switching technologies are first examined by the SCIS Model Office Equation Module (MOM), which identifies equipment costs associated with the least common denominators of costs -- the basic investment drivers of the switch or "cost primitives." Examples include the cost of a central processor millisecond, and the non-usage-sensitive cost per line termination in the switch.[76] The MOM individually analyzes each office specified by the BOC, and then develops a weighted average output for each cost primitive that is specific to the particular switch technology.

46. The cost primitives are next converted by the Vertical Service Module (VSM) within SCIS into investment figures for the resources (*e.g.*, real time, memory, signalling packets) needed to implement a specific feature or function in the switch. The VSM model, among other tasks, must identify possible tariff structures for the feature or function, and create an actual feature-specific costing algorithm using MOM cost primitives, user-entered inputs, and vendor-supplied switch resource measurements. The VSM model must be adjusted as necessary to reflect whether any part of the feature is already recovered by an existing tariff structure, and separate, additional algorithms may be necessary to generate feature investment output in a format appropriate to the possible tariff structure. The result of applying individual feature cost algorithms to cost primitives that are specific to a given technology is expressed as a cost per line, per call, per customer, *etc.*, for a given technology. The analyses performed by MOM and VSM combine to provide these SCIS output reports, which are then further aggregated and refined by the BOC to develop investment costs for, *e.g.*, BSE rate elements. As the NYNEX nonproprietary description notes, the BOC develops its own algorithms in a process separate from SCIS, in order to weight the costs of a service in a manner that reflects the extent to which different switch technologies are used in its territory to offer the service, and:

> Depending on the switch technology mix, average results could vary among user communities. In fact, these cost differentials could be magnified if a particular feature costs considerably more, or less in a particular switch technology.

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[74] *Compare 1989 TRP Waiver Order*, 3 FCC 2d 7200, 7202 (1988) (suppression of data "would prevent other parties from commenting on the proposed rates, thus depriving the Bureau of a valuable resource in our review of annual filings.")

[75] The following description is taken from the non-proprietary description in the NYNEX Description and Justification for Transmittal 57, Appendix B; similar non-proprietary descriptions were supplied by other BOCs in their November 1 transmittals. Other non-proprietary materials consulted include "Bellcore's Switching Cost Information System (SCIS) Cost Model: A Practical Approach to a Complex Problem," paper submitted June 20, 1990 by V. Schmid-Bielenberg, Director, Switching and Network Cost Analysis (Bellcore), to Symposium on Marginal Cost Techniques for Telephone Services, National Regulatory Research Institute.

[76] A list of cost primitives is provided by the non-proprietary description of SCIS included in the November 1 tariffs. *See, e.g.*, NYNEX Transmittal 57, D&J Appendix B at Fig. 4.

NYNEX Transmittal 57, D&J Appendix B at 9-10.

47. The MOM and VSM analyses are dependent on continually updated technical information supplied to Bellcore for use in SCIS by the switch vendors,[77] and certain of this information is stored within the SCIS model in lookup tables.[78] The MOM analyses are also dependent, when specific cost studies are run by the BOC's technicians, on the raw data supplied by the BOC as well as its specification of parameters that alter certain variables within the SCIS algorithms, and hence the SCIS output reports.

48. The SCIS model thus constitutes a quite sophisticated computer simulation -- essentially, an assembly of interwoven mathematical expressions that, for each technology, replicate a complex electronic switching system. In addition to its inherent complexity, SCIS is intimately, and inextricably, dependent upon other parties' competitively sensitive data. For its currency and methodological soundness, SCIS must have up-to-date vendor data; for its actual operation, the model requires specification by the operator of the competitively sensitive raw data inputs of BOCs and vendors alike. As the unit investment for BSEs and subsequent calculations used to develop rates are grounded on SCIS, some ability to examine the effects of SCIS variables is necessary in order to identify the source of individual BSE rates, and to undertake reasoned analysis of an individual carrier's rates and the differences between individual carriers. Accordingly, we now turn to the determination of suitable mechanisms by which to effect a reasonable degree of disclosure of these calculating engines.

49. Our *in camera* review of the SCIS model, both as initially provided by Ameritech and since by other BOCs, delineates several difficulties arising from the interwoven complexities of the SCIS model and switch vendor data. These inter-related difficulties preclude any simple redaction of data, or truncation of the operational SCIS model's capabilities, that would not also essentially defeat the purpose of disclosure.[79] Our discussion below thus seeks to craft protected disclosure procedures that are sufficiently refined to mitigate these problems.

3. Switch Vendor Inputs

50. We first consider how to ameliorate the competitive harm that switch vendors assert would result from disclosure of sensitive data used as SCIS inputs. The switch vendors' inputs to SCIS take the form of technical, performance, and cost specifications that are used to develop the SCIS algorithms that simulate central office operations and related investment. As such, they are transparent to the model's use by carriers, and equally to its review by third parties: no one asserts that a particular vendor, or vendor's data, has the potential to distort the apportionment of switch costs, whether by manipulation of the SCIS model's internal elements, or the resulting unit investment figures for provision of individual BSEs by specific technologies, in a manner that requires review by the Commission or third parties. Our own *in camera* examination of SCIS confirms this view. With regard to vendor input data, therefore, our concern should be weighted toward protecting that data from potentially harmful exposure, while not seriously compromising the validity or accessibility of other elements of SCIS.

51. Therefore the redacted SCIS model supplied to intervenors will have competitively sensitive data supplied by switch vendors masked or removed as specified in Attachment B.

4. SCIS Model Algorithms

52. Apart from such visible use of vendor data, the SCIS model's internal architecture is intimately dependent on vendor data, and safeguarding this data is not a simple process of mechanical redaction. Simply deleting the switch vendors' sensitive, proprietary inputs in the manner described above would not preclude the use of the software and accompanying documentation to "reverse engineer" the vendor inputs, with potentially serious consequences for both the vendors and the continued usefulness and commercial value of SCIS.[80]

53. The Bellcore algorithms that constitute the SCIS model are, in effect, the heart of SCIS: the simultaneous operation of these complex equations, in conjunction with data furnished by BOCs and switch vendors, generate the technology-specific SCIS output reports that are the foundation of subsequent cost development and ratemaking processes. Useful review of the SCIS model itself, as opposed to individual carriers' input assumptions and subsequent BOC transformation of SCIS output reports, necessarily entails the ability to examine these algorithms in detail to determine the manner of their operations upon SCIS inputs, and the resulting SCIS output reports, and so evaluate the methodological soundness of the entire simulative apparatus.[81] While the extensive and complex nature of SCIS precludes any casual dissection of

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[77] Technical information provided Bellcore by switch vendors includes: long range product development plans and delivery schedules; detailed technical descriptions of switch architecture; hardware engineering rules and capacities; unit level prices of individual switching components; discount schedules; service descriptions (how the switch implements a particular service); and resource consumptions on a per feature or per function basis, as required. NYNEX Transmittal 57, D&J Appendix B at 5.

[78] *E.g.*, real times, memory, signalling packets for ISDN services, equipment capacities, *etc. See id.*

[79] We refer to the software to be supplied to intervenors as the "redacted SCIS model" for convenience.

[80] In addition to the vendors' representations respecting the aggressively competitive market for switching equipment, we note that the regular trade press accounts of this market describe structural elements that include (1) excess supply; (2) strong domestic and foreign competition; and (3) consequent tightening of competitive bidding strategy. *See, e.g.*, "Turmoil Pervades the Telephone System Industry," *Business Communications Review*, July 1991; "The Global CO Switch Market: A Tough Game Gets Even Tougher," *Telephony*, July 23, 1990; "Confronting Low Bids and Support Gaps," *Business Communications Review*, December 1989; "U.S. Central Office Switch Market," *Telecommunications*, February 1987.

[81] A simple example is the SCIS model's reliance in particular runs on either "average" or "marginal" cost, a distinction with consequences not readily apparent from that nomenclature. The decision between these modes is made by the licensee carrier's SCIS technician at the console, but selecting one or the other putative cost basis does not reveal (1) how the internal SCIS algorithm defines these terms, or (2) whether or to what extent other BOC input assumptions may affect the operation of the SCIS model under the different options. The non-proprietary description of SCIS contained in several of the November tariff

these equations,[82] third parties, especially if afforded access to the algorithms, might have the ability and incentive either to (1) clone the elements of SCIS most useful to creating a competitive product, or (2) work backward from the algorithms to extract the specific switch characteristics that inform the algorithms. The algorithms, after all, are simply a mathematical expression of the most detailed characteristics of the switches whose costs are being apportioned between several discrete functions provided to customers.

54. Using the SCIS software package to discover competitively sensitive vendor pricing or switch design data in this manner might also require that the inquiring party have access to the BOC inputs and technologyspecific SCIS output reports, but as explained elsewhere, these materials are less entitled to protection: they involve the foundation of the BOCs' ratemaking mechanism, and as such are inherently susceptible to further BOC transformations that are independent of SCIS results. For this reason such materials have generally been subject to unobstructed review by intervenors. To obstruct reverse engineering, parties might be denied access to the SCIS documentation that explains the model's underlying algorithms, but that would effectively limit their ability to assess the model's inherent validity and would not adequately insulate vendor data.[83] There is no facile resolution of these difficulties; they are inherent in the use of a complex computer model to apportion the joint and common costs of switch equipment into minute functional "slices." While the raw switch vendor data used to generate SCIS-based reports on particular switch types or technology "families" is neutral and transparent to the concerns of interexchange carriers and ESPs, none of whom have sought disclosure of that data, the masking of such data in the redacted SCIS model to be supplied for parties' examination is not sufficient by itself to preclude either (1) the reverse engineering of switch vendor prices or architecture, or (2) the less rigorous, but still problematic, interpolation of a technology's performance and cost characteristics from SCIS output reports alone.

55. The complex equations that are the heart of the SCIS model represent the considerable intellectual product of the Bellcore staff assigned to maintain and refine the model.[84] The BOCs, through BellCore, have a substantial proprietary interest in this model and its licensing prospects; it does not strain the facts to state that if SCIS did not exist, it -- or something functionally similar -- would have to be invented. Accordingly, to protect the intellectual product of BellCore (*i.e.*, the BOCs) as well as switch vendors' proprietary data, we will require that the SCIS operating software provided to parties who have signed the model nondisclosure agreement in Attachment A have deleted from its visual displays any references to (i) switch vendors' pricing for specific carriers, (ii) identification of switch components, and (iii) descriptions of time allocated by the switch components to particular functions. A list of redactions is provided as Attachment B.

56. While these protective measures address the switch vendors' concerns, they necessarily limit the participation by parties. Therefore, in addition to the staff review of the SCIS model conducted *in camera*, the SCIS algorithms will be subjected to an independent audit performed on the basis of questions submitted by Commission staff and other parties, with the auditor's report to be submitted *in camera* to the Commission. While AT&T has argued that such an independent audit of the SCIS algorithms amounts to an abdication of the Bureau's responsibilities, the Bureau does not intend to rely solely on the audit.[85] Rather, the report of the independent auditor, reflecting the determination of issues referred by both petitioners and Bureau staff in addition to a general evaluation of the SCIS model, will supplement the staff's review of SCIS and inform the pending investigation of individual BOC tariffs. Because of the sensitive materials involved and the priority we attach to enabling the maximum practicable participation by parties, we have chosen this method to augment staff review and enable an informed examination of the model. Independent auditors will be required to sign the nondisclosure agreement (Attachment C); to provide reports to the Commission under protective cover pursuant to § 0.459 of the Commission's Rules; and to return all materials furnished them at the conclusion of this proceeding. We believe these measures strike a reasonable balance between the credible concerns of the switch vendors, and the public concern that their legitimate interests not unnecessarily limit third party review either of the SCIS model generally, or of its application by individual carriers.

5. BOC Inputs

57. BOCs assert that BOC-provided input data used in SCIS should be protected from disclosure because BOC pricing arrangements with vendors, if revealed, would expose vendors to competitive harm, and also because certain data describing BOC technology investment projections and demand estimates would reveal BOC marketing intentions and, to the extent these data contain discounts from vendors that BOCs expect to receive, would also compromise vendor data.

58. Though the user controllable parameters that BOCs specify when generating SCIS studies are not described in the waiver petitions, the BOCs apparently view some of these inputs as proprietary as well. User controllable parameters include cost of money assumptions, office characteristics (required for weighted averaging in multiple

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filings recognizes over a dozen such carrier-specified input parameters. *See, e.g.*, NYNEX Telephone Companies, Transmittal No. 57, Description and Justification (D&J), Appendix B, at 8.

[82] *See* AT&T Communications ("Pro America"), FCC 86-249, released May 14, 1986, at para. 23; *compare* California PUC proceedings' use of independent auditors, *supra*.

[83] Even without the SCIS algorithms, parties with access to a particular BOC's technology-specific SCIS output reports could compare the pricing of individual BSEs implicit in each technology as well as the different sensitivity of a particular BSE to provisioning by different technologies. These data would enable a vendor's competitors to design or "tune" the next generation of switches to exploit the apparent competitive vulnerabilities of other vendors. These sensitive aspects of a specific switch manufacturer's performance and cost characteristics cannot be directly or indirectly disclosed, even under a nondisclosure agreement, without raising a significant risk that compromised data will in turn compromise the implementation of ONA.

[84] The design and cost parameters of the switch vendors' products are also implicit in the algorithms, and potentially accessible by reverse engineering efforts.

[85] Indeed, our *in camera* review of SCIS has already identified significant methodological issues which the Commission is investigating. *See ONA Investigation Order* at paras. 10-16.

office SCIS studies), capacity cost calculations used in connection with marginal cost studies, modification of the "getting started" costs, assumptions of maximum available processor and signalling capacity that reflect "local engineering practices," the use of current generic switch software vs. older vintages, and the assumed mix of digital and analog interface technologies.[86]

59. The user controllable parameters identified in the nonproprietary SCIS description, as well as any other user controllable SCIS parameters, constitute a significant arena of BOC discretion in the development of BSE unit investment figures. Because these parameters are intimately involved with the generation of technology-specific SCIS output reports, and the latter will be disclosed only to the independent auditor, as described in the following section, it becomes correspondingly more important that parties affected by BSE rates be enabled to review these fundamental and discretionary aspects of the BOCs' ratesetting process. While the technology-specific outputs will be disclosed only to the auditor, and similarly restrictive disclosure is warranted for BOC inputs that allow the extraction of data that is competitively sensitive to switch vendors,[87] the other BOC input parameters go to the fundamentals of their rate development process and should be disclosed to parties signing the nondisclosure agreement.

6. SCIS Output Reports

60. SCIS generates technology-specific output reports. Disclosure of these output reports could compromise the confidentiality of switch vendors' competitively sensitive data, at two levels. First, the Model Office Equation software module (MOM) within SCIS develops such investment outputs for a particular switching technology's cost "primitives" -- factors that represent the most disaggregated characteristics of the technology. These factors are based on generic machine characteristics, such as central processing unit (CPU) time needed to perform internal switch functions -- switch characteristics that are not intrinsically allocable on a specific basis to particular features or functions. These technology-specific cost primitives are then used as inputs to drive the next software module within SCIS, the Vertical Service Module (VSM). The VSM develops a second, further refined set of technology-specific output reports, assembled from the cost primitives by combining them into specific switch features and functions. The BOC then applies separate, postSCIS investment calculation procedures to aggregate these VSM results across different technologies, and uses these aggregated output reports (no longer a pure SCIS product) as direct investment figures for the subsequent stages of the ratesetting process.

61. As the VSM output reports, once aggregated, are not technologyspecific, they pose no direct risk of substantial competitive harm to switch vendors. Moreover, absent detailed disclosure of the BOC procedures used to aggregate the MOM and VSM outputs generated by SCIS for specific technologies, the aggregated output reports cannot be deconstructed into their competitively sensitive precursors. Indeed, the aggregated outputs are generally provided by the cost support materials supplied with the November 1 filings. Our concerns with respect to SCIS output reports instead turn on the degree of disclosure appropriate for technology-specific reports, and two related matters: (i) the process by which BOCs transform their technology-specific MOM outputs into VSM outputs, and (ii) the subsequent process by which the (still technology-specific) VSM outputs are aggregated to nonsensitive investment data.

62. Our review of the pleadings and the *in camera* SCIS materials indicate that disclosure of the technology-specific SCIS output reports, even subject to a nondisclosure agreement, would pose a significant risk of substantial competitive harm to switch vendors.[88] While we recognize that parties would prefer direct access to these materials, we believe the most important aspects of the parties participation can be accomplished by interaction with the SCIS model and BOC inputs, as described in the preceding section, provided that the technology-specific SCIS outputs are consistently redacted from the SCIS software supplied to parties. We will therefore initially rely on the audit process to assist the Commission in determining (1) whether each carrier's progression from the first, technology-specific SCIS output reports to aggregated, nonproprietary investment data is based on sound methodology, and (2) to analyze the contribution that any methodological differences between the carriers' approaches to this process make to the rate differences in ONA tariffs.

63. The transformation of MOM outputs into VSM investments appears to involve BOC discretion in crafting the procedures that will generate investment for particular ONA features and functions. Accordingly, we will instruct the auditor selected by the BOCs to determine the reasonableness of procedures used to transform technology-specific MOM outputs into the aggregated, unit investment data for BSEs that has been supplied with tariffs on a nonproprietary basis. We will also instruct the auditor to determine the quantitative contribution to BSE rate differences between carriers that is attributable to differences in these methodological approaches, and to identify any complications or difficulties raised for the parties' comparison of SCIS operation and results that arise from BOCs' use of different editions of SCIS software. Parties

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[86] *See, e.g.*, the nonproprietary description of SCIS contained in NYNEX Transmittal 57 D&J, Sec. 2, Tab IV at 8.

[87] We expect the BOCs to provide all data for all offices and remotes used in the model office studies that support the proposed BSE rates. We will, however, allow inputs that we view as competitively sensitive to switch vendors to be changed. The model office study may be re-run with arbitrary amounts substituted for the following inputs: percent office discount for material/engineering and installation; switching modeul right to use dollars included per switching module, and right to use dollars included in getting started costs.

[88] The central difficulty is posed by the switch vendors' reasonable concern that the pricing and switch architecture information supplied to enable SCIS simulations of specific switch operations can be "reverse engineered" from the model if parties have access to technology-specific SCIS outputs. Vendors are concerned that even a single, static SCIS output report limited to a single switch type would allow such reverse engineering; their concerns are magnified by the prospect of intervenors' active interaction with the operational SCIS model and observing its cost results, whether for MOM model office reports or for selected VSM features and functions, for multiple switch types.

will be provided an opportunity to submit queries for the auditor. The BOC parties will have an opportunity to object to particular queries.

V. CONCLUSION AND ORDERING CLAUSES

64. In the *SCIS In Camera Order,* we determined that the SCIS model licensed by Bellcore to the BOCs, the SCM model, related BOC inputs and parameter selections, associated input data from switch vendors, and technology-specific SCIS outputs, constitute confidential materials that are exempt from disclosure under Section 552(b)(4) of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and the Commission's implementing regulations, 47 C.F.R. §§ 0.457(d), 0.459. The *SCIS In Camera Order* granted the BOC waiver petitions insofar as the petitions sought an exemption from the requirement that cost support materials be filed as public documents that are routinely open to public inspection. The same considerations require that all pleadings and reports related to competitively sensitive materials will also be exempt from disclosure under Section 552(b)(4) of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and the Commission's implementing regulations, 47 C.F.R. §§ 0.457(d), 0.459.

65. Accordingly, IT IS ORDERED, that pleadings dealing with competitively sensitive materials as identified in this Order shall be submitted under protective cover.

66. IT IS FURTHER ORDERED, that the Bell Operating Companies SHALL DESIGNATE a single, independent auditor they will retain to examine all SCISrelated software and documentation, in the form submitted to the Commission pursuant to the *SCIS In Camera Order,* no later than February 7, 1992. US West may, at its option, submit its SCM model for review as part of this audit, or it may retain a separate auditor to examine its SCM model on the same schedule.

67. IT IS FURTHER ORDERED, that the Bell Operating Companies SHALL PROVIDE the independent auditor with all SCIS-related software and documentation, in the form submitted to the Commission pursuant to the *SCIS In Camera Order,* no later than February 14, 1992.

68. IT IS FURTHER ORDERED that parties of record SHALL SUBMIT to the Commission all relevant queries to be directed to the independent auditor no later than March 9, 1992.

69. IT IS FURTHER ORDERED, that the Bell Operating Companies SHALL FILE with the Commission any comments on queries to be directed to the independent auditor no later than March 16, 1992.

70. IT IS FURTHER ORDERED, that the Bell Operating Companies SHALL FILE with the Commission SCIS-related software and documentation, with confidential material redacted to the extent provided in Attachment B of this Order, no later than February 21, 1992.

71. IT IS FURTHER ORDERED, that the Bell Operating Companies SHALL PROVIDE parties signing the nondisclosure agreement, attached hereto as Attachment A, with redacted SCIS software and related material as described in this Order, no later than February 28, 1992.

72. IT IS FURTHER ORDERED, that the independent auditor SHALL SUBMIT an *in camera* description of the scope of the proposed audit to the Commission no later than February 28, 1992. This audit should include a validation of the SCIS model's methodology, a list of model parameters subject to BOC variation, and a validation of the method used by each BOC to convert technology-specific SCIS output reports into aggregated outputs. These submissions shall be made under protective cover to the Commission.

73. IT IS FURTHER ORDERED, that the Motion to Accept Late Submission of Materials for *In Camera* Inspection, filed January 8, 1992 by NYNEX IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Attachment A: Model Nondisclosure Agreement for Access to Redacted SCIS Model

ATTACHMENT A
Nondisclosure Agreement to Govern Competitively Sensitive SCIS-Related Information

1. This nondisclosure and protective agreement ("agreement") is effective this ____ day of _____, 1992, by and between _____|BOC| and its counsel of record |"BOC"| and _____ [the party] and its counsel of record in all phases of the investigation of the competitively sensitive aspects of tariffs[89] filed in the ONA Proceeding (Transmittal Nos. _____), including administrative and judicial review. Materials subject to this agreement may not be disclosed after conclusion of the tariff investigation and must be returned to |BOC|.

2. Whereas, [the party] has requested that |BOC| provide certain information and produce certain documents relied on in preparing the referenced transmittals; and the Bureau has identified elements of the SCIS model that may be provided to parties to the investigation, subject to the protection of a nondisclosure agreement;

3. Whereas, the information requested by [the party] may constitute BOC's competitively sensitive commercial or financial information, including, but not limited to, cost of service information;

[89] The term "competitively sensitive" as it is used in this agreement has the meaning stated in footnote 59 of Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, DA 91-129, released January 31, 1992 (Com.Car.Bur.)

4. Accordingly, the parties hereto and their counsel agree that the following terms and conditions shall govern the use of such information provided to [the party] by [BOC] in the context of this proceeding:

5. For purposes of this agreement," competitively sensitive information" means commercial information or trade secrets, within the meaning of 5 U.S.C. Sec. 552(b), which the Bureau Ordered withheld from public inspection in the *SCIS In Camera Order* released by the Common Carrier Bureau of the Federal Communications Commission on December 23, 1991.

6. Competitively sensitive information disclosed to [the party] under the terms of this Order in the form of the SCIS model software and operating manuals, shall be segregated from material deemed non-competitively sensitive by the Bureau Orders.

7. Competitively sensitive information may be disclosed:

(a) to [the party], its associated attorneys, paralegals and clerical staff, employed in the ONA tariff investigation.

(b) to any person requested by [the party] to furnish technical or other expert services, or otherwise to prepare material for the ONA investigation, except that disclosure to [the party's] personnel in a position to use the information for competitive, commercial or business purposes sha'll be limited to the minimum extent disclosure is needed by [the party] to obtain analysis and management guidelines for the ONA tariff investigation.

8. Notwithstanding paragraph 7 of this agreement, disclosure of competitively sensitive information shall be limited to one attorney and two cost accounting experts designated by [the party].

9. Furthermore, disclosure of confidential information shall be limited to persons who sign the Access Agreement, *infra*, stating that they have read this agreement and consent to be bound by its terms.

10. The documents and computer disks which are subject to this agreement shall be appropriately marked "designated competitively sensitive material of [BOC]." In the event any additional designated material is provided to signatories pursuant to this agreement it shall be similarly identified in supplemental attachments.

11. Any competitively sensitive information produced, revealed, or disclosed to counsel by [BOC] in this proceeding shall be used exclusively for purposes of participating in this proceeding, including any appeals, and shall not otherwise be used or disclosed for any other purpose. The limitation on the use or disclosure of any competitively sensitive information disclosed during this proceeding shall be construed to prohibit disclosure of the competitively sensitive information and to prohibit making decisions, participating in any decision-making processes, or rendering advice, legal or otherwise, wherein any information or knowledge derived from said competitively sensitive information is utilized in any manner other than for purposes of this proceeding.

12. [The party] may, in any pleading it files in the ONA tariff investigation, reference the competitively sensitive information disclosed under this agreement, but only if it complies with the following procedures:

(a) Any portions of the pleading which contain competitively sensitive information are physically segregated from the remainder of the pleading;

(b) the portions containing competitively sensitive information are covered by a separate letter referencing this protective agreement;

(c) each page of the filing which contains competitively sensitive information subject to this agreement is clearly marked "competitively sensitive pursuant to protective agreement entered _____[date];" and

(d) the competitively sensitive portion of the pleading shall be served only upon the Commission and the BOC named in this agreement, unless the Bureau directs otherwise.

13. Disclosure of materials described herein shall not be deemed a waiver by [BOC] in any other proceeding, agency or court, of any privilege or entitlement to competitively sensitive treatment which could be raised. [The party] by viewing said documents:

(a) agrees not to assert any such waiver;

(b) agrees not to use information derived from any competitively sensitive materials to seek disclosure in any proceeding other than the ONA tariff investigation; and

(c) agrees that accidental disclosure of privileged information shall not be deemed a waiver of the privilege.

14. In the event that any competitively sensitive material is released or otherwise becomes publicly available other than as a result of a violation of this Agreement or other unlawful means, the nondisclosure provisions of this Agreement shall cease with respect to such competitively sensitive material but shall remain in full force and effect as to the competitively sensitive material not so released or made publicly available.

15. Counsel may request the Commission to make one copy of competitively sensitive information (to which counsel must acknowledge receipt pursuant to this agreement), and counsel may thereafter make additional copies but only to the extent required and solely for preparation and use in the ONA tariff investigation, and provided further, that all such copies shall remain in the possession and custody of counsel at all times. Counsel shall make no further copies of any competitively sensitive information or portions thereof but shall return to the Commission immediately after the final decision in the ONA tariff investigation (including any administrative or judicial review thereof) all competitively sensitive information originally provided by the Commission as well as all copies made, and shall certify that no quotes or extracts from such competitively sensitive information have been retained by any person having access.

16. Upon conclusion of the ONA tariff investigation, including any appeals that may be taken, the designated material, other than the designated material which has been made part of the formal record in this case, in accordance with paragraph 12 hereof, shall be returned to [BOC], or shall be destroyed pursuant to written permission obtained from [BOC]. Upon conclusion of this proceeding, notes, memoranda or other written materials of any kind containing competitively sensitive or proprietary

data or summaries or compilations of the whole or any part of the designated material (other than those which constitute attorney work products) shall be tendered to [BOC] or shall be destroyed pursuant to written permission obtained from [BOC].

17. This agreement shall continue in full force and effect until the proceeding, including appeals, has ended.

18. Notwithstanding the expiration of this agreement at the end of the proceeding, the terms and conditions of this agreement shall continue to apply to any competitively sensitive information provided by [BOC] to Counsel hereunder.

19. This agreement shall benefit and be binding upon the parties hereto, their counsel, and each of their respective heirs, successors, assigns, affiliates, subsidiaries, and agents.

20. This agreement shall be governed in accordance with the laws of the District of Columbia.

_____ (signature)
_____ (print name)
_____ (business address)
_____ (business telephone)
_____ (counsel for)
_____ (date signed)

BOC

_____ (attorney)/BOC address
_____ (date signed)

Access Agreement (for Attachment A)

I, _____ [print name], _____ [print title], an employee, officer, director, shareholder, agent, consultant, expert witness [circle appropriate response] of _____ [print name of firm], located at _____ [print address], hereby acknowledge that I have received and read a copy of the nondisclosure and protective agreement effective _____ between _____ ["BOC"] and _____ in connection with tariff review proceedings and any resulting investigation of BOC Transmittal Nos. _____.

I understand and agree to be bound by all of the terms and provisions of the agreement. I further state that neither I nor any firm with which I am affiliated will use any competitively sensitive information (as defined in the agreement) to which I obtain access pursuant to said agreement in connection with the development of any marketing strategies or plans of any firm, person, or entity and that I will use said competitively sensitive information exclusively for the purpose of participating in the proceeding (as defined in the agreement), including any appeals.

Dated: _____,199__ _____ (signature) _____ (business address) _____ (business telephone)

RETURN TO:
(Attorney)
(BOC)
(address)

EXECUTION BY BOC:
Dated: _____,199_____ (BOC counsel)

ATTACHMENT B
3 Specified Redactions for Preparation of Software to be Provided Intervenors Signing The Model Agreement in Attachment A.

Redactions Needed to Protect Vendor Interests

--Assumption Tables
--Investment Tables
--Realtime Tables
--Memory Tables
--Actual vertical service and feature costs for Material/EFI

Attachment C: Model Nondisclosure Agreement for provision of unredacted SCIS software and documentation, including algorithms, to independent auditors.

Model Nondisclosure Agreement for Independent Auditors

1. "Competitively Sensitive Information" as used herein means any information in written, oral or other tangible or intangible forms, which is designated as "confidential" or "proprietary," by (carrier) in the belief that it contains a trade secret or other confidential research, development, commercial or financial information.[90] If the Competitively Sensitive Information is provided orally, it shall be treated by you as competitively if clearly identified as such by (carrier), and if within five (5) business days after disclosure, (carrier) confirms in writing that such information is subject to their Agreement. If you disclose information which has not been designated by (carrier) as competitively sensitive this Agreement shall not apply.

2. Any Competitively Sensitive Information produced, revealed or disclosed by (carrier) or the Tariff Division to you under this Agreement shall be used exclusively by you for the purposes of conducting your review of (the carrier's) models under the *SCIS Disclosure Order*, the Communication's Act and Commission Regulations, and for no other purpose. After execution of this Agreement and subject to the restrictions of this Agreement, (carrier) or the Tariff Division may provide the Competitively

[90] The term "competitively sensitive" as it is used in this agreement has the meaning stated in Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, DA 92-129, released January 31, 1992 (Com.Car.Bur.).

Sensitive Information disclosed to the Tariff Division pursuant to [Commission Rules] to you for the exclusive purpose of your fulfilling your contractual obligations to {[Bellcore or US West]}.{ } Any competitively sensitive information which may have been previously provided to you by the Tariff Division relating to your review of (carrier's) models under Commission Rules shall be subject to this Agreement.

3. You shall not disclose or divulge Competitively Sensitive Information to any unauthorized person without the prior written approval of (carrier).

4. Any of your agents, employees or consultants to whom (carrier) authorizes the disclosure of Competitively Sensitive Information shall agree to use such information exclusively as provided by this Agreement. Prior to the disclosure of such Competitively Sensitive Information to any such agent, consultant or employee, you shall: (a) give (carrier) prior notice of the identity and affiliation of any such person; (b) require any such person to read and sign an agreement in the form of Exhibit C which is attached hereto, agreeing to abide by the terms of this Agreement; and, (c) deliver to (carrier) a copy of such agreement. All persons receiving access to Competitively Sensitive Information shall treat it as competitively sensitive and shall not disclose it nor afford access to it to any other person not authorized by this Agreement to obtain said information nor shall such information be used in any other manner or for any other purpose other than as provided in this Agreement. No copies shall be made of any Competitively Sensitive Information or any part thereof without the prior written consent of (carrier). Upon conclusion of the review of (carrier's) models pursuant to [Commission Rules], all copies of Competitively Sensitive Information provided to you shall be returned to the Tariff Division.

5. If you dispute the designation of Competitively Sensitive Information as competitively sensitive and such dispute cannot be settled by discussions between (carrier), the Tariff Division, and you, the party challenging the designation of the information as competitively sensitive may seek review by the FCC and shall have the burden of proving that the information is not competitively sensitive. Pending resolution of the dispute by the FCC, the parties agree to be bound by this Agreement.

6. This Agreement shall not apply to information which (a) was previously known to you free of any obligation to keep such information confidential; (b) is disclosed to third parties by (carrier) without restriction; or (c) becomes otherwise publicly available by other than unauthorized disclosure.

7. Any notices required under this Agreement to be sent to (carrier shall be sent by certified mail to:

8. This Agreement shall be governed in accordance with the laws of [the District of Columbia].

ACKNOWLEDGED AND AGREED TO:

_____ _____
Name Date

Access Agreement (for Attachment C)

"AGREEMENT FOR ACCESS TO (CARRIER'S) PROPRIETARY AND CONFIDENTIAL INFORMATION

I, _____, _____, an
Name Title

employee, officer, director, shareholder, agent, consultant, [circle the appropriate response] of _____, located at _____,
Name of Firm

hereby acknowledge that I have received and read the letter agreement between (carrier) and (independent auditor) regarding Competitively Sensitive Information as defined therein provided by (carrier) and/or the Tariff Division for purposes of reviewing certain computer models under [Commission Rules]. I understand and agree to be bound by all the terms of said letter agreement. I further state that neither I nor any firm with which I am affiliated will use any Competitively Sensitive Information to which I obtain access for any purpose except as expressly provided therein.

Dated:

Signature
business Address
Business Telephone

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 92-9

In the Matter of

Redevelopment of Spectrum to
Encourage Innovation in the
Use of New Telecommunications
Technologies

NOTICE OF PROPOSED RULE MAKING

Adopted: January 16, 1992; Released: February 7, 1992

Comment Date: April 21, 1992
Reply Comment Date: May 21, 1992

By the Commission: Commissioner Marshall not present; Commissioners Barrett and Duggan issuing separate statements.

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INTRODUCTION

1. By this Notice, the Commission proposes to establish new areas of the spectrum to be used for emerging telecommunications technologies. These new frequency bands would be designated from 220 MHz of the spectrum between 1.85 and 2.20 GHz. We further propose to provide a regulatory framework that will enable the existing fixed microwave users in these bands to relocate to other fixed microwave bands or alternative media with minimum disruption to their operations. We believe this can best be accomplished through the use of a flexible negotiations approach that permits financial arrangements between incumbents and new service providers during an extended transition period. We also propose to permit state and local government facilities, including public safety, to continue their current operations on a fully protected basis by exempting such facilities from any mandatory transition period. Establishment of these emerging technologies bands will ensure the availability of spectrum for the continued growth and development of new and innovative services made possible by emerging and anticipated future technologies.

BACKGROUND

2. In the early 1970s, the Commission employed the concept of setting aside spectrum for new and existing uses when it reallocated 115 MHz of spectrum in the 800/900 MHz bands from UHF-TV broadcasting and the federal government to land mobile services in Docket No. 18262.[1] This action, one of the largest and most significant reallocation actions undertaken by the Commission to date, was taken to meet the growing needs of the land mobile industry. Initially, 40 MHz of the newly available spectrum was allocated for new "high capacity" common carrier land mobile technologies, i.e., cellular radio, and another 30 MHz was allocated to conventional and new trunked operations, and private radio operations, including specialized mobile radio (SMR) services. Most significantly, in response to suggestions from the commenting parties the Commission also established eight "land mobile reserve bands" with a total of 45 Mhz of spectrum. These eight bands were not allocated to any specific service, but rather were set aside to accommodate new land mobile services and unexpected growth in existing services.

3. Subsequent developments have proven the advantages of having spectrum available in a single range of frequencies for new services and technologies. As envisioned in Docket No. 18262, the 45 MHz of 800/900 MHz spectrum has been used to introduce new services, foster new technology and provide for expansion of existing services. For example, spectrum from the reserve has been used for the new air-to-ground telephone service. These frequencies are also being used to introduce new technologies. In particular, the National Plan for Public Safety Services employs new spectrum efficient technologies, advanced private radio systems are using trunked and narrowband channels, and cellular radio operators are now implementing new advanced digital systems.[2] Finally, the 1970's reserve spectrum is being used by both the common carrier cellular and private land mobile communities to meet expanded demand.

NEED FOR EMERGING TECHNOLOGIES BANDS

4. In recent years, technological advancements in digital and signal processing systems have opened possibilities for the development of a broad range of new radio communication services. These technological advances have increased the need for spectrum to foster the growth and development of new services, primarily for mobile applications. However, this has created an environment in which new services are vying with each other and with existing users for relatively small slivers of spectrum that are incapable of supporting full implementation of new service. The Commission currently has pending before it a number of requests for new services and technologies

for which sufficient spectrum is unavailable. These requests include: 200 MHz for new personal communications services (PCS);[3] 40 MHz for data PCS;[4] 33 MHz for a generic mobile-satellite service;[5] 70 MHz for a digital audio broadcasting service;[6] and 33 MHz for low-Earth orbit satellites.[7] Further, the interest and demand are demonstrated by the large number of applications for experimental authority to develop and test new technologies being submitted to the Commission. Currently, the Commission has authorized dozens of experiments with PCS-type technologies and requests for others are continuing to arrive.

5. Various forms of digital audio services are under development or being considered in Europe, Canada and Japan. These countries and Europe are also developing personal communications services (PCS). Some of the specific personal communications services currently being developed internationally include the British CT-2 advanced cordless telephone and CT-3 microcellular systems, Europe's general service mobile (GSM) system and Japan's "Handy Phone" service. In order to ensure the availability of spectrum for these services, the countries involved are allocating spectrum for new mobile services that use emerging technologies. For example, Europe and Japan recently have moved to allocate spectrum between 1 and 3 GHz for mobile services that use new technologies. In addition, the 1992 World Administrative Radio conference will address the allocation of spectrum for new mobile services.

6. We believe it also is in the best interest of the United States to make spectrum available for the development of new services and technology. We recognize that, because most of the spectrum is now heavily used, the conditions for finding spectrum for these new emerging technologies bands will be much more challenging than in the 1970s. Accordingly, the plan for use of these bands will have to take into account existing operations to a much greater extent than the earlier reserve. In particular, we cannot merely apply the "band clearing" method used in the 1970s. Rather, we will need to develop a new plan that includes specific provisions for minimizing impact on existing services. Nevertheless, we believe that establishing these emerging technologies bands is desirable and will again prove advantageous for facilitating the continuing development of new communications technologies and the growth and expansion of existing services.

7. As indicated above, the Commission has before it a significant number of requests for new services. New spectrum would permit the Commission to meet the needs of these services in an orderly manner. This spectrum would provide an available resource that could be drawn upon for the implementation of new services and the expansion of existing services. The new technology band concept also would foster the development of new technology by providing clear guidance on future use of these frequencies. The current lack of available spectrum tends to have a chilling effect on the incentives for manufacturers and financial institutions to develop and fund new communications research. The emerging technologies bands would help provide some of the structure, in terms of frequency of operation and operating plan, that is needed to facilitate the development of equipment. At the same time, this new concept would provide considerable flexibility with regard to the types of technologies and services that can be authorized. In reaching this conclusion, we have considered that the spectrum reserve established in the early 1970s resulted in the introduction of new cellular and trunked technologies in the reserve bands.

8. Accordingly, we believe that the creation of emerging technologies bands would further the Commission's mandate to encourage the provision of new technologies and services to the public and encourage the larger and more effective use of radio in the public interest.[8] Moreover, such action would complement our recent pioneer's preference rules intended to foster the development of new technologies and services.[9]

SPECTRUM ISSUES

9. We recognize that establishment of bands for emerging technologies poses significantly more difficult challenges than were present in the early 1970s. At that time, spectrum was available in the lower frequency bands that was only lightly used and the licensees on those frequencies could be relocated relatively easily. The situation is, of course, much different today. There are substantial operations on virtually all of the lower frequency bands, so that establishment of emerging technologies bands will unavoidably necessitate relocation of significant numbers of existing users. The task, then, is to identify a relatively wide band of frequencies that can be made available with a minimum of impact on existing users and that also can provide suitable operating characteristics for new, primarily mobile, services.

10. The spectrum selected must meet the requirements of a broad range of possible services, including land mobile and satellite. The factors that must be considered include:

Cost of equipment- If the spectrum chosen is in a range for which state-of-the-art equipment is not available, then high costs would delay the introduction of new services.

Amount of spectrum- There must be enough spectrum available to allow substantial development and economies of scale.

Feasibility of relocation- The existing licensees must be able to relocate with a minimum of cost and disruption of service to consumers.

Non-government spectrum- In order to avoid the need for coordination and to speed the process of transition, the new bands should come entirely from spectrum regulated by the FCC.

International developments- It is desirable for the spectrum chosen to be compatible with similar international developments. The WARC-92 most likely will focus on this spectrum for mobile use.

We intend to consider these factors in evaluating alternative plans for new spectrum. Interested parties are invited to comment on these evaluative factors and their use and to suggest modifications and additions.

11. *Spectrum Study.* With the above considerations in mind, the Commission's staff conducted a study to examine the possibility of creating emerging technologies bands.[10] This study identified the most suitable region of the spectrum, determined the existing users of that spectrum, explored alternatives for relocating those users to higher bands or other media with a minimum disruption

of service, and examined the cost of such relocation.[11] The study concluded that 220 MHz in the 1.85-2.20 GHz region could be designated for innovative technologies and services.

12. The study limited the consideration of candidate frequency bands to those in which mobile operations are practicable with current state-of-the-art electronic components and manufacturing capabilities. It found that while experimental mobile use is taking place at higher bands, the state-of-the-art technology for the compact, lightweight, portable electronic components expected to be used in new services generally will limit operations in those services to frequencies under 3 GHz.[12] Thus, the study concluded that frequencies above 3 GHz would not be acceptable. It next found that the spectrum below 1 GHz generally does not appear to offer any possibilities for spectrum availability. Most of this spectrum is used for broadcasting and land mobile services that would be very difficult to relocate. These services have very large numbers of users, particularly in the major urban areas, and there are no bands with similar technical characteristics to which the existing users could be relocated. The remaining frequencies below 1 GHz are narrow, scattered bands that would not provide sufficient spectrum.

13. For the above reasons, the study concentrated on the spectrum between 1 and 3 GHz. This region of the spectrum is also the subject of considerable research and developmental activities, both domestically and internationally. In fact, the 1992 World Administrative Radio Conference will address the allocation of spectrum in the 1 to 3 GHz range to meet emerging requirements for new mobile and satellite services.

14. The study identified three non-Government bands from this spectrum for consideration: 1.85-2.20, 2.45-2.50, and 2.50-2.65 GHz.[13] The study found the 2.45-2.50 GHz band, which is allocated for use by Industrial, Scientific, and Medical (ISM) equipment, less desirable because it has a limited amount of spectrum (50 MHz) and because there is no replacement band that offers the same physical characteristics for the existing ISM operations in that band. The 2.50-2.60 GHz band, which is used for multipoint distribution service (MDS) and instructional fixed television service (ITFS), also was eliminated because there are no other frequency allocations currently available to which existing MDS operations could be relocated.

15. The remaining 1.85-2.20 GHz band is used for fixed private and common carrier microwave services, public land mobile service, broadcast auxiliary operations, and multipoint distribution service. Specifically, the 1.85-1.99, 2.11-2.15 and 2.16-2.20 GHz bands are used for private operational fixed and common carrier microwave operations. The private operational fixed licensees are local governments (including public safety), petroleum producers, utilities, railroads, and other business users such as the manufacturing, banking, and service industries. Systems range from a few links to very large systems that use hundreds of links. They are used as part of communications systems for local government and public safety organizations. These facilities are also used to control electric power, oil and gas pipeline and railroad systems, and to provide routine business voice, data, and video communications. The common carrier licensees are telephone, cellular telephone, and paging providers. Telephone companies use this band to provide telephone service to remote areas, cellular companies to interconnect cell sites with mobile telephone switching offices, and paging companies for control and repeater stations.

16. The 1.99-2.11 GHz band is used for broadcast auxiliary services. The licensees in this service are television broadcasters and cable television operators. Broadcast auxiliary services include studio-to-transmitter links, inner city relays, and electronic news gathering (ENG) mobile operations. These services are used to transmit video programming from remote sites to the studio and from the studio to the transmitter sites. The 2.15-2.16 GHz band is used for multipoint distribution service (MDS) and its licensees are, for the most part, wireless cable television operators. MDS is used to supply video programming to subscribers over city-wide areas and to rural areas where it is not economical to install cable service.

17. The study finds that the private and common carrier fixed microwave operations using this spectrum can be relocated to higher frequency bands that provide for similar type services and can support propagation over similar path lengths. Further, it observes that there are other reasonable alternatives for fixed microwave such as fiber, cable and satellite communications, which can utilize off-the-shelf equipment to provide these services.

18. The study also concludes that it is not practicable at this time to relocate the broadcast auxiliary and the multipoint distribution services that use spectrum in the 1.85-2.20 GHz range. It finds that currently there is heavy use of the ENG bands and that the forthcoming introduction of broadcast advanced television service may result in more congestion in these bands. As a result, the future requirements of the broadcast auxiliary services for operating channels could grow significantly. The higher frequency bands that are suitable for these operations do not appear to have the capacity to support the existing 2 GHz operations and new growth. Since there currently are a large number of MDS applications before the Commission and the MDS service is a developing industry, the study further finds that it would not be desirable to relocate the MDS channels at 2 GHz.[14]

19. *Proposed Reallocations.* Based on the findings of our staff study, we propose to reallocate 220 MHz of the 1.85 to 2.20 GHz band that is currently used for private and common carrier fixed microwave services. The specific frequencies proposed to be reallocated are the 1.85-1.99, 2.11-2.15, and 2.16-2.20 GHz bands.[15] We believe that this spectrum will meet the requirements of a significant number of new services and technologies. We recognize that establishment of emerging technologies bands in this spectrum will be considerably more difficult than the reserve established in the 1970s. The private and common carrier fixed microwave services operating in these bands provide important and essential services. Accordingly, we intend to pursue this reallocation in a manner that will minimize disruption of the existing 2 GHz fixed operations. We believe that this can be best achieved by providing for significant flexibility in negotiations between existing users and parties developing new services.

20. As indicated in the study, we believe that it is technically feasible to relocate these services to higher frequency bands or to alternative media. There appears to be adequate capacity in the higher frequency bands that are allocated to fixed microwave services and can support path lengths similar to those of the existing 2 GHz fixed operations. In this regard, we propose to make available all fixed microwave bands above 3 GHz, both the com-

mon carrier and the private bands, for reaccommodation of fixed microwave operations currently licensed in the 1.85-2.20 GHz spectrum.[16] To provide for this reaccommodation, we propose a "blanket" waiver of the eligibility requirements in these bands for existing 2 GHz fixed microwave users. Specifically, we propose that all existing 2 GHz common carrier and private microwave operations be eligible for relocation to any of the higher frequency fixed microwave bands. The technical rules and coordination procedures currently applicable to each of the higher frequency bands, however, will apply. Existing 2 GHz fixed operations that relocate to the common carrier bands will be subject to the coordination procedures of Section 21.100 and 21.706, and those that relocate to private operational fixed bands will be subject to the coordination procedures of Section 94.63. We will encourage licensees moving from the 1.85-2.20 GHz band with path lengths of under 10 miles to reaccommodate their operations in frequency bands above 10 GHz to preserve the general availability of spectrum in the lower bands for longer path links not feasible at the higher frequencies.[17]

21. The study did not examine the availability or suitability of government spectrum for relocation of the existing 2 GHz operations. We note that some parties have suggested the possibility of making available a portion of the 1.71-1.85 GHz government fixed, mobile, and space band for relocation of some 2 GHz operations.[18] We invite comment on the feasibility of such action.

22. *Transition Plan.* Our intent is to reaccommodate the 2 GHz licensees in a manner that is the most advantageous for these existing users, least disruptive to the public and the most conducive to the introduction of new services. We recognize that this proposed relocation will entail significant costs and we intend to minimize those costs wherever possible. To the extent possible, it is our intention to permit some or all of these costs to be paid by replacement users. The approach needed for this relocation contrasts sharply with the "band clearing" approach used in the 1970s, when only two full service UHF television stations and a handful of TV translators had to be moved to new frequencies. Moreover, it may be that some new technology services will be able immediately to operate in segments of the emerging technology bands not presently used by existing 2 GHz licensees in some areas. Our proposed transition plan would consist of three basic elements, discussed below.

23. First, we wish to ensure the availability of the existing vacant 2 GHz spectrum for the initial development of new services and to discourage possible speculative fixed service applications for this spectrum. We therefore will continue to grant applications for fixed operations in the proposed new technologies bands; however, applications for new facilities submitted after the adoption date of this Notice will be granted on a secondary basis only, conditioned upon the outcome of this proceeding.[19] This will provide some accommodation for the needs of fixed microwave users, particularly in less congested areas.

24. Second, except for state and local licensees, we propose to allow currently licensed 2 GHz fixed licensees to continue to occupy 2 GHz frequencies on a co-primary basis with new services for a fixed period of time, for example ten or fifteen years. Ten years could generally be expected to provide for a complete amortization of existing 2 GHz equipment. A fifteen year period would extend the relocation period through the useful life of that equipment. At the end of this transition period, these facilities could continue to operate in the band on a secondary basis. This means that if, after the transition period, new services were not able to use the spectrum because of interference from fixed microwave systems, those fixed microwave systems would be required to eliminate the interference, negotiate an arrangement for continued operation with the new service operator, or cease operation. This would allow some fixed microwave systems to continue operations indefinitely, particularly in rural areas where less spectrum may be required for new services. Comment is requested on this approach. In particular, parties are requested to comment on the technical feasibility of our proposal to permit sharing between new services and the existing 2 GHz fixed microwave operations on a co-primary basis.

25. We recognize that state and local government agencies would face special economic and operational considerations in relocating their 2 GHz fixed microwave operations to higher frequencies or alternative media. We are particularly sensitive to the need to avoid any disruption of police, fire and other public safety communications. To address these concerns, we propose to exempt state and local government 2 GHz fixed microwave facilities from any mandatory transition periods. Rather, these facilities would be allowed to continue to operate at 2 GHz on a co-primary basis indefinitely, at the discretion of the state and local government licensees. These agencies would be permitted to negotiate the use of their frequencies with other parties. In this manner, transfer of state and local government operations could be arranged so as to accommodate fully any special economic or operational considerations with regard to the institutions affected. We would, of course, encourage those institutions to relocate to higher frequency bands or alternative media. Consistent with our overall objective in this matter, applications submitted after the adoption date of this Notice for new 2 GHz facilities by state and local government agencies will be authorized on a secondary basis only, conditioned upon the outcome of this proceeding.

26. To provide maximum flexibility in the relocation process, we believe it is desirable to permit parties seeking to operate new services to negotiate with the existing users for access to the 2 GHz frequencies and, conversely, to permit incumbents to negotiate with the new service providers for continued use of the spectrum. Therefore, we propose to allow providers of new services assigned spectrum allocated to the new emerging technologies bands to negotiate financial arrangements with existing licensees. This would encourage reaccommodation and underwriting of the costs of transition for the 2 GHz users. In return, the new licensees would receive earlier access to the frequencies used by the existing fixed microwave operators. Such arrangements would allow market forces to achieve a balance between the need to minimize the reaccommodation cost to existing operators and the immediate need for the spectrum to permit provision of these new services. It would also provide incumbents with a way to assure that the new licensees would not interfere with their expanded facilities or current facilities at the end of a mandatory transition period. We request comment on this manner of proceeding. Specifically, we solicit information on how this process should be carried out and what restrictions, if any, the Commission should place on negotiated arrangements.[20]

27. We request comment on these proposals and alternatives. Interested parties are also invited to submit plans for other approaches that might lessen the impact on existing fixed microwave systems while ensuring the timely availability of 2 GHz frequencies for new services. One alternative approach would be to adopt a phased spectrum implementation approach. In addition to unused spectrum that would be available at any time, specific blocks of frequencies would be made available for new services at specified intervals. For example, 50 to 70 MHz of the 220 MHz could be made available in five year increments. This would provide some spectrum for new services relatively quickly, but would minimize the impact to most existing 2 GHz users, with the exception of those users in the first bands to be reallocated. Under this option, we also would still intend that new fixed facilities, for which applications were received after the adoption of this Notice, be secondary and that current facilities, except those used by state and local government licensees, be reduced to secondary status at the end of the transition period. Parties favoring the phased approach are requested to suggest mechanisms for the selection of the blocks of spectrum. Another alternative would be to allow all currently licensed 2 GHz fixed users, not just state and local government licensees, to continue to operate on a co-primary basis while permitting negotiations for the use of the spectrum. Parties are requested to comment on the desirability and feasibility of this option. Finally, we request comment on whether and to what extent the possible availability of adjacent government spectrum might affect the market-based access approach suggested above. For example, would the availability of a portion of the 1.71-1.85 GHz band for relocation provide sufficient incentive in the transition process to eliminate the need to alter the incumbent 2 GHz operations to secondary status. We request comment on all of the above considerations.

USE OF THE EMERGING TECHNOLOGIES BANDS

28. As indicated above, frequencies in the emerging technologies bands would be intended primarily for use by new services made possible through technological advances, but would also be available for expansion of existing services. The location of the proposed bands tends to favor new land mobile and satellite services. Generally, we are of the view that, at a minimum, requests for operation of new services in these bands should demonstrate that the service makes innovative use of a new technology and that the technology is most appropriately suited to operate on in the 2 GHz region. Similarly, requests for expansion of existing services should demonstrate that the expansion would offer some substantial improvement in either quality of service or spectrum efficiency. Such improvements would generally be provided through use of new technology. We seek additional proposals and comment regarding the criteria to be applied in determining whether a new service or expansion of an existing service merits frequencies from the emerging technologies bands.

29. We anticipate that the first use of these emerging technologies bands will be for the creation of a new personal communications service (PCS). We intend to proceed with a Notice of Proposed Rule Making on PCS in the near future. This Notice will address the amount of spectrum to be allocated to PCS, further define the nature of PCS services, and define the interference and technical criteria for operation of those services, in general and in relation to 2 GHz fixed users. The further definition of such criteria will make it possible to determine the amount and location of 2 GHz frequencies that could be used immediately, without interference to, or from, the existing fixed users. This information in turn will be used to develop specific proposals for the negotiation to be used in this instance.

CONCLUSION

30. The potential benefits to American consumers and manufacturers of creating spectrum for innovative technologies and new services are many. Accordingly, we conclude that emerging technologies bands should be created to foster the development and implementation of new technologies and services. We recognize that creating emerging technologies bands will have a major impact on existing users; however, based on the staff study, we believe that the current users of these bands may be reaccommodated in other portions of the spectrum. We solicit comment on the proposals made herein.

PROCEDURAL MATTERS

31. Regulatory Flexibility Analysis. Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds as follows:

A. Reason for Action

This rule making proceeding is initiated to obtain comment regarding the development of emerging technologies bands around 2 GHz to provide spectrum for new innovative technologies and services.

B. Objective

The objective of this proposal is to provide adequate spectrum in a reasonable time frame for the development and implementation of new innovative technologies and services to the American public.

C. Legal Basis

The proposed action is authorized by Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r). These provisions authorize the Commission to make such rules and regulations as may be necessary to encourage the more effective use of radio in the public interest.

D. Description, Potential Impact, and Number of Small Entities Affected

This proposal would require many existing private and common carrier fixed microwave operators in the 1850-2200 MHz band, some of which are small entities, to reaccommodate their operations into higher bands or change to alternative technologies. This proposal may provide new opportunities for radio manufacturers and supplier of radio equipment, some of which may be small businesses, to develop and sell new equipment. Further, it may provide many new telecommunication services that may greatly impact the abilities of small entities to conduct business. Because this proposal concerns only the allocation of spectrum, and not the licensing of systems or

stations, we are unable to quantify other potential effects on small entities. We invite specific comments on this point by interested parties.

E. Reporting, Record Keeping and other Compliance Requirements

None.

F. Federal Rules which Overlap, Duplicate or Conflict with this Rule

None.

G. Significant Alternatives

If promulgated, this proposal will provide spectrum for the development of new innovative technologies in the immediate future. We are unaware of other alternatives that would provide such spectrum flexibility in the immediate future. We solicit comments on this point.

32. Other Matters. This is a non-restricted notice and comment rule making proceeding. Ex parte presentations are permitted, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

33. This action is taken pursuant to Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r).

34. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before April 21, 1992, and reply comments on or before May 21, 1992. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

35. For further information concerning this rule making proceeding contact Mr. Fred Lee Thomas at (202) 653-8117, Office of Engineering and Technology, Federal Communications Commission, Washington, DC 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See* generally *First Report and Order and Second Notice of Inquiry*, Docket No. 18262, 35 Fed. Reg. 8644 (June 4, 1970); *Second Report and Order*, Docket No. 18262; 46 FCC 2d 752 (1974), *reconsidered, Memorandum Opinion and Order*, Docket No. 18262, 51 FCC 2d 945 (1975); *aff'd sub nom. NARUC* v. *FCC*, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976).

[2] *See Report and Order* GEN Docket Nos. 84-1231, 84-1233, 84-1234, 2 FCC Rcd 1825 (1986); *see also Report and Order* in GEN Docket No. 87-390, 3 FCC Rcd 7033 (1988).

[3] *See* generally comments filed in response to the *Notice of Inquiry*, GEN Docket No. 90-314, 5 FCC Rcd 3995, and Petitions for Rule Making, RM-7175, filed by PCN America, November 7, 1989, and RM-7140, filed by Cellular 21, September 22, 1989.

[4] *See* Petition for Rule Making, RM-7618, filed by Apple Computer, Inc., January 28, 1991.

[5] *See Notice of Proposed Rule Making* GEN Docket No. 90-56, 5 FCC Rcd 1255 (1990).

[6] *See Notice of Inquiry* GEN Docket No. 90-357, 5 FCC Rcd 5237 (1990), and Petition for Rule Making, RM-7400, filed by Satellite CD Radio, Inc.

[7] *See* Petitions for Rule Making, RM-7771, filed by Constellation Communications; RM-7773, filed by TRW, Inc.; RM7805, filed by Ellipsat Corporation; and RM-7806, filed by American Mobile Satellite Corporation.

[8] *See* 47 U.S.C. §§ 157 and 303(g).

[9] *See Report and Order* GEN Docket No. 90-217, 6 FCC Rcd 3488 (1991), reconsideration pending. The pioneer's preference rules are intended to encourage the development of new technologies and services by offering a licensing preference to entities that develop an innovative new service or a substantial enhancement to an existing service.

[10] *See* "Creating New Technology Bands for Emerging Telecommunications Technology," FCC/OET TS92-1 (January, 1992). A copy of this report has been placed in the record of this proceeding and comments on the report are requested.

[11] The study only considered spectrum already primarily under the jurisdiction of the Commission. Spectrum allocated to the Government, which is under the jurisdiction of the National Telecommunications Information Administration (NTIA), was not considered because of the delay and uncertainty that would be involved in obtaining reallocation of such spectrum not under our jurisdiction. *See* H. R. 531 and S. 2904, 101st Congress, 1st Session (1991), the "Emerging Telecommunications Technologies Act of 1991. " If adopted as proposed, these bills would require the Federal Government to make available up to 200 MHz of spectrum for Non-Government use. This may give the Commission additional spectrum that could be used for the same purposes as the spectrum being made available in this proceeding. However, the known requests for new spectrum already exceed what is proposed in the bills and it is uncertain that spectrum made available through this process will meet the needs of many of the proposed new services. It is still uncertain when such spectrum will be available and where in the spectrum it will be located.

[12] The study also found that while research is underway to increase this limit, there is no way to determine when more advanced equipment will be available.

[13] Most of the bands in this portion of the spectrum were eliminated from consideration because they are allocated for government use or do not offer a significant amount of spectrum.

[14] The Commission currently has more than 24,000 applications on file with the Common Carrier Bureau for new MDS facilities.

[15] Frequencies between 2.16 and 2.162 GHz are shared by common carrier fixed microwave and multipoint distribution services.

[16] The frequencies available for this reallocation include the 3.7-4.2, 5.925-6.425, 6.525-6.875, 10.7-11.7, 11.7-12.2, 12.7-13.25, and 17.7-19.7 GHz bands.

[17] We will encourage licensees moving from the 1.85-2.20 GHz band with path lengths of under 10 miles to reaccommodate their operations in frequency bands above 10 GHz to preserve the general availability of spectrum in the lower bands for longer path links not feasible at the higher frequencies. We also will encourage fixed microwave operators to consider other non-radio alternative media to meet their telecommunication needs, particularly fiber optic circuits. In allocating spectrum, one of the primary considerations is whether there is a technological dependence of the service on radio rather than wire lines. Mobile communications necessarily will always require use of radio spectrum, and in the past the Commission provided large amounts of spectrum for fixed microwave because wireline alternatives often were economically prohibitive. However, in the last five years technological advancements in optical communications have resulted in fiber being very competitive with fixed microwave. Further, the capacities of fiber optic circuits greatly exceed those of fixed microwave. For these reasons, many common carrier and private communication requirements, which in the past were met by fixed microwave, are now met with fiber optic circuits. Fiber deployment in the United States at the end of 1990 is estimated to be approximately 5.5 million miles. *See* "Fiber Deployment Update - End of Year 1990," by Jonathan M. Kraushaar, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, March 1991. In connection with encouraging migration to other, non-radio alternative media, we ask for comment on whether we should award tax certificates to fixed microwave licensees who receive financial compensation from an entity seeking to use the spectrum for new technology as part of an agreement to surrender their license and use other, non-radio alternative media. Grant of tax certificates in such circumstances would appear to be similar to our recent decision to award tax certificates to AM broadcast licensees receiving financial compensation for surrendering their licenses for cancellation. *See Review of Technical Assignment Criteria for the AM Broadcast Service*, 6 FCC Rcd 6273, 6472 (1991). We also seek comment on whether the Commission is authorized to grant tax certificates to non-broadcast licensees. *See* 26 U.S.C. Sec. 1071. In this regard, we request comment on the applicable precedent that could support the use of tax certificates in this proceeding. (*See, e.g. Telocator Network of America*, 58 RR 2d 1443 (1985), *recon. dismissed*, 1 FCC Rcd 509 (1986)).

[18] This matter has been raised in a preliminary fashion with NTIA. It should also be noted that there are government space, fixed, mobile, and aeronautical operations in this band that support national security and other governmental services to the public.

[19] We request comment on the appropriateness of this "cutoff" date.

[20] Our principal desire is to compensate existing 2 GHz users for the costs of relocation. We recognize, however, that such market-based negotiations could possibly result in windfalls for the incumbent 2 GHz licensees. We request comment on the likelihood that such windfalls would occur and the impact they might have on the initiation of new services.

SEPARATE STATEMENT OF COMMISSIONER ANDREW C. BARRETT

In re: Amendment of Section 2.106 of the Commission's Rules to Allocate Emerging Technology Bands for Future Requirements.

This Notice of Proposed Rulemaking [Notice] begins a difficult, but necessary, proceeding to identify available spectrum for emerging communications technologies. Since my arrival at the Commission, I have kept abreast of the ongoing technological developments occurring in the digital audio, personal communications and mobile communications areas. Many of these technological advances have been integrated into new services that are now being offered in markets overseas. If the U.S. proponents of emerging technologies and services are going to remain competitive in a global context, I believe the Commission must address the spectrum issues that will allow such services to be launched. Thus, I support this Notice.

I write separately to highlight several issues in this docket. First, the Notice proposes to reallocate to emerging technologies 220 MHz of the 1.85-2.20 GHz band that is now used for existing fixed microwave services. I note that the Commission already has received requests totalling more than 370 MHz for new services and technologies [i.e. personal communications, data, Low-Earth orbit, digital audio or mobile satellite services]. Such requests clearly exceed the 220 MHz being examined in this Notice. Thus, I think it is important that, while the Commission proceeds with this docket, we also remain abreast of ongoing legislative efforts taking place between Congress and the National Telecommunications and Information Administration to identify additional spectrum for commercial uses. I hope that commenters will address the adequacy of the spectrum band proposed in this Notice with respect to the spectrum needs of emerging technologies.

Second, I hope to see comments in this docket which will address the technical feasibility of operating public safety microwave systems on a co-primary basis with other new services. Proponents of emerging technologies and services should not only justify their particular spectrum requirements, but also should provide alternative plans for addressing the needs of incumbent operators impacted by any reallocation decisions. This is particularly true where public safety operations are involved.

Finally, I would like to see commenters address the feasibility of utilizing additional market incentives to shift incumbent operators from their current frequency bands. Specifically, I am interested in reviewing the feasibility of using the tax certificate as an additional market incentive for commercial, microwave operators to sell their operations, turn in their licenses and shift their facilities to non-radio alternative media such as fiber optics. Such a use of the tax certificate could be analogous to action the Commission took in the AM [Radio] Improvement broadcast docket. I look forward to reviewing comments on the feasibility and legality of using the tax certificate in the context of this docket.

SEPARATE STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In Re: Amendment of Section 2.106 of the Commission's Rules to Allocate Emerging Technology Bands for Future Requirements.

I support this item, whose laudable purpose is to further the development of new and promising technologies. By clearing more space for new technologies, the Commission seeks to foster technological progress without directing specific results --- an impartial but significant act to encourage new communications services.

At the same time, however, I wish to express my strong concern that when there is any danger of displacing *proven* communications services in favor of unproven or speculative services, a heavy burden of proof rests upon us. I believe that the Commission must always demonstrate maximum sensitivity to the needs of incumbent users--- especially those in the public safety community--- who have for long periods acted in good faith and have abided by our rules.

Specifically, we need to ensure, when change appears warranted and necessary, that we have built in ample transition periods, measures for ensuring adequate compensation, and generous substitute spectrum positions for those who must move. And we need to consider the interests of consumers, who have come to rely on many of these existing communications services.

My general inclination, moreover, will be to support a limited or tentative grant of spectrum to a promising but speculative new service. This will enable the Commission to reclaim any unused or seriously underused spectrum if a market does not develop as hoped for the new service.

Because this proposal seems to me to express careful regard for the interests of incumbents, I support it. I think it important also to remind existing licensees that they need to become *efficient* users of spectrum as the electromagnetic spectrum becomes more crowded.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 18, 1992

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Abilene Community Radio - Request for acceptance of a hearing fee for a new FM station at Abilene, Texas - **Granted** (January 2, 1992).

American Tunaboat Association - Request for waiver of fee for inspection of communications facilities aboard oceangoing vessels - **Denied** (February 3, 1991).

Bluegrass on the Air, Inc. - Request for refund of hearing fee for a new FM broadcast station at Philpot, Kentucky - **Granted** (February 6, 1992).

Broad, Inc. - Request for refund of filing fee for MMDS station in Fargo, North Dakota - **Granted** (February 5, 1992).

Bell Atlantic Network Services, Inc. - Request for refund of filing fees for three petitions for waiver of Part 69 of the tariff rules - **Granted** (February 3, 1992).

Busch, Kelly Vaughan - Request for waiver of hearing fee for a new FM station at West Lafayette, Indiana - **Denied** (February 10, 1992).

Centel Cellular Company RSA Market No. 570 - Application for Review requesting reinstatement of four rural cellular applications - **Dismissed as Moot** (January 2, 1992).

Galiano, Juan - Request for refund of hearing fee for a new FM station at Hormigueros, Puerto Rico - **Granted** (January 29, 1992).

Gradick, Steven - Request for refund of hearing fee for an FM station at Valley, Alabama - **Granted** (January 29, 1992).

Gorecomm, Inc. - Request for refund of hearing fee for a new FM broadcast station at Morehead, Kentucky - **Granted** (February 5, 1992).

MCI Broadcasting Limited Partnership - Request for refund of hearing fee filed for new FM station at Temecula, California - **Granted** (February 3, 1992).

Premiere Radio Networks, Inc. - Request for refund of hearing fee for a new FM broadcast station at Edmond, Oklahoma - **Granted** (February 5, 1992).

Ramona Broadcasting Company - Request for refund of a hearing fee for a new Fm station at Sun City, California - **Granted** (January 29, 1992).

Southern Starr of Arkansas, Inc. - Request for refund of a filing fee for a change in community license of KOLL(AM) at Pine Bluff, Arkansas to Maumelle, Arkansas - **Granted** (January 29, 1992).

Taylor, Robert B. - Request for refund of hearing fee for AM radio broadcast station WEXI(AM), Jupiter, Florida - **Granted** (February 6, 1992).

WNPC, Inc. - Request for refund of the hearing fee for a new FM station at Newport, Tennessee - **Granted** (February 6, 1992).

White, John H. - Request for reinstatement of application for new FM station at LaCrosse, Wisconsin- **Denied** (February 3, 1992).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE E. PRIDE, CHIEF, FEE SECTION ON (202) 632-0241.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JAN 2 1992

James L. Oyster, Esquire
Route 1, Box 203A
Castleton, Virginia 22716

Dear Mr. Oyster:

This is in response to your request for acceptance, nunc pro tunc, of the hearing fee filed by C. K. Adams d/b/a Abilene Community Radio (Abilene), applicant for a new FM station at Abilene, Texas.

You state that Abilene's hearing fee was sent via Express Mail to the Mellon Bank in Pittsburgh, Pennsylvania, the Commission's correspondent bank for fee collections, on Saturday, July 13, 1991. Although the Express Mail package arrived July 14, one day prior to the July 15 filing deadline, the Post Office refused to make delivery because Bank personnel were unavailable to sign a receipt for delivery. Instead, the Post Office placed a postcard notification in Mellon's Post Office Box stating that the package was available for pick-up. However, the pick-up did not occur until Tuesday, July 16, one day after the filing deadline. Consequently, Abilene's hearing fee was treated as late filed and returned.

You ask for acceptance of Abilene's filing fee because the hearing fee was late filed through no fault of the applicant. Rather, you suggest that the package containing the fee payment was timely mailed and, in fact, did arrive at Mellon's Post Office Box on time, but was not picked by the Bank until three days later when the filing deadline had passed.

Based on the foregoing, including Abilene's Express Mail receipt plainly evidencing Express Mail's attempted delivery prior to the date for filing the hearing fee, and on our own internal review of the circumstances surrounding this matter, we have concluded that Abilene's hearing fee should be treated as if timely filed.

Accordingly, Abilene's request for acceptance of its hearing fee, nunc pro tunc, is granted. Abilene is directed to resubmit its hearing fee package, including a copy of this letter, within thirty days from the date of this letter.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 3 - 1992

Mr. August Felando
President
American Tunaboat Association
One Tuna Lane
San Diego, California 92101-5896

Dear Mr. Felando:

This is in response to your request for a waiver of the fee for inspection of communications facilities aboard oceangoing vessels, filed by the American Tunaboat Association.

You state that the membership of the Association is composed exclusively of individuals who own and operate U.S. Flag vessels. You believe that the ship inspection fee is excessive on account of the competitive nature of the tuna market, including competition from foreign fishing vessels. Therefore, due to the difficulty of passing the cost of inspections on to consumers, you request a waiver of the fee for the Association's membership. You also recommend that the Schedule of Charges be revised to establish separate fees for fishing vessels less than 1,600 gross tons but greater than 200 gross tons and for fishing vessels of less than 200 gross tons.

The 1989 Budget Act imposes fees for ship station inspections and other services that the Commission provides to the public. The Schedule of Charges, contained in the Budget Act and administered by the Commission, results from a determination by the Congress that the fees established therein represent a fair distribution of the Commission's cost of service among affected telecommunications users. The Commission adopted the fee schedule exactly as approved by Congress and the President. See Public Law No. 101-239, 103 Stat. 2106. See also Conference Report to accompany H.R. 3299, H. R. Rep. No. 386, 101st Cong., 1st Sess. 20-28, 433-435 (1989); reprinted in the Congressional Record of Nov. 21, 1989 at H9333.

With regard to exemptions from the fee requirements for licensees in the private radio services, the Budget Act limited such exemptions to non-profit entities operating in the public safety radio services. Moreover, the Commission has determined that nothing in the Budget Act or its legislative history empowers it to waive the fee requirements that Congress has fashioned for particular categories of users or broad groups of users. See Establishment of a Fee Collection Program, 2 FCC Rcd 947,960 (1987), reconsidered, 3 FCC Rcd 5987 (1988). Thus, we cannot find

that the fee for ship station inspections may be waived as it applies to members of the American Tunaboat Association.

Finally, since the fee structure underlying the Schedule of Charges is established by Congress, Congress is the appropriate body to consider any revisions to the fee structure that you believe would be helpful to the tuna fishing industry.

Accordingly, your request is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 6 - 1992

Stanley G. Emert Jr., Esq.
Bryce & Emert
3712 77th Avenue SE
Mercer Island, WA 98040

Dear Mr. Emert:

This is in response to your request for refund of hearing fee submitted on behalf of Bluegrass On the Air, Inc. (Bluegrass), applicant for a new FM broadcast station at Philpot, Kentucky.

You state that Bluegrass tendered a hearing fee in the amount of $6,760 on or before July 15, 1991. You further state that settlement documents were filed with the Commission on or before August 1, 1991, which would result in dismissal of Bluegrass' application and grant of a competing application. You now request that Bluegrass' hearing fee be refunded to you.

In a recent decision, the Commission stated that "refunds of the hearing fee paid prior to designation will be available to applicants that are dismissed, voluntarily or involuntarily, before an HDO is issued or granted without being designated for a comparative hearing." See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, 158 (1990), recon. gtd. in part, 6 FCC Rcd 3403 (1991). This aspect of the decision was reiterated on reconsideration. See 6 FCC Rcd at 3403. Because Bluegrass' voluntarily dismissed its application prior to designation for hearing, your request for fee refund will be granted.

Accordingly, a check for $6,760, payable to Stanley G. Emert Jr., Counsel for Bluegrass On the Air, Inc., will be forwarded to you at 3712 77th Avenue SE, Mercer Island, Washington, 98040 at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section, at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 5 - 1992

Stephen E. Coran, Esquire
Brown Finn & Nietert, Chartered
Suite 660
1920 N Street, N.W.
Washington, D.C. 20036

Dear Mr. Coran:

This is in response to your request for a refund of the filing fee paid by Broad Inc. with its application for certification of completion of modifications to its existing Multichannel, Multipoint Distribution Service (MMDS) station in Fargo, North Dakota.

Broad applied for and received authorization to construct a modification of its existing, licensed facilities by increasing its power. The fee for that application was $155 per channel. 47 C.F.R. § 1.1104(f)(2)(ii). Having completed construction, Broad filed an application for certification of the station's modifications, and the staff required him to submit an additional fee of $1,820.00 per channel.

In authorizing the collection of fees by the Commission, Congress specified a fee for the "Initial License (per channel)" in the Multipoint Distribution Service. 47 U.S.C. §158 (Schedule of Charges). The legislative history of that provision indicates that "initial licenses" include "first licenses or licenses adding a new frequency." H.R. Rep. No. 99-453, 99th Cong., 1st Sess. 432. Thus, it does not appear that Congress intended that the Commission levy a fee for MMDS license applications where that license is neither the first license nor a license for a new channel.

Accordingly, your request is granted. A check, drawn in the amount of $1,820.00 and payable to ~~Broad Inc.~~, will be forwarded to you at the earliest practicable time. If you have any questions concerning this refund, please call the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 3 - 1992

Ms. Trudi W. Blair
Bell Atlantic Network Services, Inc.
1133 Twentieth Street, N.W.
Suite 800
Washington, D.C. 20036

Dear Ms. Blair:

This is in response to the request made by Bell Atlantic Network Services, Inc. (Bell Atlantic) for a refund of its fee payments made in connection with its filing of three petitions for waiver of the Part 69 tariff rules.

You state that a refund is due because the Commission has determined that no fee requirement applies to petitions for waiver of those rules.

Our review of this matter demonstrates that a refund is warranted. In its recent reconsideration of its FEES II decision, the Commission decided that the Part 69 fee requirement applies only to petitions for waiver of the Part 69 accounting and audit rules. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558 (1990), reconsidered in part, 6 FCC 5919, 5923 (1991). More specifically, the Commission decided that no fee requirement applies to petitions for waiver of the tariff rules and requirements contained in Part 69 of the rules. Id.

Accordingly, your request is granted. A check, drawn in the amount of $13,980.00 and made payable to Bell Atlantic Network Services, Inc., representing a refund for fee payments covering three petitions for waiver of the Part 69 tariff rules, will be forwarded to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 10 1992

Howard J. Braun, Esquire
Rosenman & Colin
1300 19th Street, N.W.
Washington, D. C. 20036

Dear Mr. Braun:

This is in response to your request for a waiver of the hearing fee requirement filed on behalf of Kelly Vaughan Busch, the surviving applicant for a new FM station at West Lafayette, Indiana.

You state that Ms. Busch and other mutually exclusive applicants were designated for a comparative hearing to select the licensee at West Lafayette. See Hearing Designation Order (HDO), MM Docket No. 90-583, released January 9, 1991. The HDO included an air hazard issue against Ms. Busch. You state that Ms. Busch filed a timely request with her Notice of Appearance for approval of a settlement agreement entered by all the applicants. Ms. Busch separately filed her hearing fee payment. Subsequently, upon Ms. Busch's filing of a determination of "no hazard" by the Federal Aviation Administration, the ALJ approved the settlement agreement, granted Ms. Busch's Motion on the air hazard issue and granted her application for the FM license at West Lafayette.

You argue that Ms. Busch's fee payment should be waived because her amended request for a "No Hazard" determination was timely filed with the FAA, but that the FAA unnecessarily delayed action on her request until four months after the Mass Media Bureau issued its HDO. In your view, a waiver is warranted since the action of the FAA were beyond Ms. Busch's control.

The Commission has recently considered whether to permit the refund of a hearing fee in circumstances in which the sole surviving applicant must resolve an outstanding air hazard issue. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989 (Fees II), 5 FCC Rcd 3558 (1990), reconsidered in part, 6 FCC Rcd 5919 (1991). Therein, the Commission decided to retain the fee requirement whenever an air hazard issue must be resolved on the merits. Id. at 5925. In the instant case, there is no dispute that the ALJ adjudicated the merits of the air hazard issue. The

fact that the FAA's air hazard clearance was not forthcoming before the Bureau issued the HDO is outside the purview of the Commission and provides insufficient grounds upon which to grant a waiver. Any concern that you may have concerning the timing of the FAA's action with regard to Ms. Busch's "air hazard" request should be brought to the attention of the FAA.

Accordingly, your request is denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JAN 2 1992

Theodore D. Frank, Esquire
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339

Re: Applications of Centel Cellular Company for RSA Cellular Systems on the wireline block of frequencies in North Carolina 2, 3, 5, 6, 7, and 15.

Dear Mr. Frank:

This is in reference to the Application for Review, as supplemented, filed on behalf of Centel Cellular Company (Centel), requesting reinstatement of four rural cellular applications filed by Centel. (North Carolina 2, 5, 6, and 7). The applications were dismissed by the Commission's staff when the fee payment checks accompanying the applications were returned, unpaid, by Centel's bank, and a request for reconsideration of that action was denied by the Managing Director. Moreover, Centel has pending a Petition for Reconsideration of the dismissal for similar reasons of two other applications. (North Carolina 3 and 15). Centel had requested that consideration of the Petition for Reconsideration be consolidated with the Application for Review.

In a supplement to the Application for Review, filed November 16, 1989, Centel advised the Commission that, because of full market settlements in North Carolina 2, 3, 5, 7, and 15, its Application for Review and Petition for Reconsideration had become moot insofar as those pleadings addressed applications in those markets. Since the filing of the Supplement to Centel's Application for Review, a full market settlement has also been reached in North Carolina 6.

Accordingly, the Petition for Reconsideration and Application for Review filed by Centel Cellular Company is dismissed as moot.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JAN 29 1992

Donald E. Martin, Esquire
2000 L Street, N.W.
Suite 200
Washington, D.C. 20036

Dear Mr. Martin:

This is in response to your request for a refund of the hearing fee submitted by Mr. Juan Galiano, applicant for a new FM station at Hormigueros, Puerto Rico.

You state that Mr. Galiano's application and the applications of three competing applicants were designated for hearing. Mr. Galiano filed his Notice of Appearance and fee payment after the filing deadline had passed. As a consequence, Mr. Galiano's application was dismissed and his dismissal was affirmed by the Commission. Juan Galiano, 6 FCC Rcd 895 (1991). Mr. Galiano appealed the Commission's action to the United States Court of Appeals for the District of Columbia Circuit, but has now withdrawn his appeal. You ask for a refund of the hearing fee since the Commission took no action on Mr. Galiano's application other than to dismiss it following the late filing of his Notice of Appearance and fee payment.

Based on the foregoing, your request for a refund is granted.

A check, drawn in the amount of $6,000.00 and made payable to Juan Galiano, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JAN 3 0 1992

Audrey P. Rasmussen, Esquire
O'Connor & Hannan
Suite 800
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-3483

Dear Ms. Rasmussen:

This is in response to your request for a refund of the hearing fee submitted by Steven L. Gradick, former applicant for an FM station at Valley, Alabama.

You state that Mr. Gradick has entered a settlement agreement with the competing applicant at Valley and that, as a consequence of the settlement agreement, the competing applicant will become the station's licensee and Mr. Gradick's application will be dismissed. You, therefore, ask for a refund of Mr. Gradick's hearing fee because the settlement agreement was filed before Mr. Gradick's application was designated for hearing.

Our review of this matter discloses that the settlement agreement concerning the Valley station was filed prior to the designation for hearing of applications for a comparative hearing to select the licensee at Valley. Moreover, the Mass Media Bureau has approved the settlement agreement and issued a construction permit for the Valley station. Accordingly, your request is granted.

A check, drawn in the amount of $6,760.00 and made payable to Steven L. Gradick, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 5 - 1992

Stanley G. Emert Jr., Esq.
Bryce & Emert
3712 77th Avenue SE
Mercer Island, WA 98040

Dear Mr. Emert:

This is in response to your request for refund of hearing fee submitted on behalf of Gorecomm, Inc. (Gorecomm), applicant for a new FM broadcast station at Morehead, Kentucky.

You state that Gorecomm tendered a hearing fee in the amount of $6,760 on or before July 15, 1991. You further state that settlement documents were filed with the Commission on or before August 1, 1991, which would result in dismissal of Gorecomm's application and grant of a competing application. You now request that Gorecomm's hearing fee be refunded to you.

In a recent decision, the Commission stated that "refunds of the hearing fee paid prior to designation will be available to applicants that are dismissed, voluntarily or involuntarily, before an HDO is issued or granted without being designated for a comparative hearing." See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, 158 (1990), recon. gtd. in part, 6 FCC Rcd 3403 (1991). This aspect of the decision was reiterated on reconsideration. See 6 FCC Rcd at 3403. Because Gorecomm voluntarily dismissed its application prior to designation for hearing, your request for fee refund will be granted.

Accordingly, a check for $6,760, payable to Stanley G. Emert, Jr., Counsel for Gorecomm, Inc., will be forwarded to you at 3712 77th Avenue SE, Mercer Island, Washington, 98040 at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section, at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 3 - 1992

Ms. Maria C. Maldonado
Sole General Partner
MCI Broadcasting Limited Partnership
2108 Fair Park Avenue #304
Los Angeles, California 90041

Dear Ms. Maldonado:

This is in response to your request for a refund of the fee submitted in connection with MCI Broadcasting Limited Partnership's (MCI) application for a new FM station at Temecula, California.

You state that MCI requested the dismissal of its application prior to its designation for hearing and, therefore, MCI is entitled to a refund of its hearing fee.

Our review of this matter discloses that MCI's application was dismissed at its request in the Hearing Designation Order commencing the comparative proceeding to select the licensee at Temecula. See Frank K. Spain, 6 FCC Rcd 6143 (1991). Therefore, MCI is entitled to a refund of its hearing fee. See Proposals to Reform the Commission's Hearing Process, 6 FCC Rcd 157, 158 (1990).

Accordingly, your request is granted. A check, drawn in the amount of $6,760.00 and made payable to MCI Broadcasting Limited Partnership, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 5 - 1992

Dennis P. Corbett, Esq.
Leventhal, Senter & Lerman
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006-1809

Dear Mr. Corbett:

This is in response to your request for refund of hearing fee submitted on behalf of Premiere Radio Networks, Inc. (Premiere), applicant for a new FM broadcast station at Edmond, Oklahoma.

You state that Premiere tendered a hearing fee in the amount of $6,760 on July 15, 1991. You further state that, at that time, Premiere's application for a construction permit was mutually exclusive with a renewal applicant. However, a settlement agreement between the parties was submitted to the Commission and that agreement, which provided for the dismissal of Premiere's competing application, was approved by letter of September 6, 1991. You also recite that a hearing designation order was never issued. You therefore request that Premiere's hearing fee be refunded.

In a recent decision, the Commission stated that "refunds of the hearing fee paid prior to designation will be available to applicants that are dismissed, voluntarily or involuntarily, before an HDO is issued or granted without being designated for a comparative hearing." See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, 158 (1990), recon. gtd. in part, 6 FCC Rcd 3403 (1991). This aspect of the decision was reiterated on reconsideration. See 6 FCC Rcd at 3403. Because Premiere voluntarily dismissed its application prior to designation for hearing, your request for a fee refund will be granted.

Accordingly, a check for $6,760, payable to Premiere Radio Networks, Inc., will be forwarded you at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section, at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JAN 29 1992

John S. Neely, Esquire
Miller & Miller, P.C.
Suite 760
1990 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Neely:

This is in response to your request for a refund of the hearing fee filed by Ramona Broadcasting Company (Ramona), former applicant for a new FM station at Sun City, California.

Pursuant to the procedure adopted in Proposals to Reform the Commission's Hearing Process, 6 FCC Rcd 3403, 3409 (1991), Ramona paid its hearing fee prior to July 15, 1991, prior to the designation of its application for a comparative hearing. The Hearing Designation Order (HDO) was issued on August 6, but Sun formally notified the presiding Administrative Law Judge that it would not participate in the proceeding on August 26, 1991, the date that Notices of Appearance were due.

Prior to the Commission's decision in Proposals to Reform the Commission's Hearing Process, applicants were required to submit their hearing fees with their Notices of Appearance, and applicants that elected to withdraw from a comparative case could do so without suffering the loss of their hearing fee. We do not believe that Proposals to Reform the Commission's Hearing Process was intended to modify an applicant's ability to withdraw, on or before the Notice of Appearance deadline, without the loss of its hearing fee. See letter to Howard M. Weiss, Esquire from Marilyn J. McDermett, Associate Managing Director, dated September 24, 1991.

Accordingly, your request is granted. A refund, in the amount of $6,760.00 and made payable to Ramona Broadcasting Company, will be forwarded to you at the earliest practicable time. If you have any questions concerning this refund, please call the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JAN 29 1992

Marjorie R. Esman, Esquire
Walker, Bordelon, Hamlin, Theriot
and Hardy
701 South Peters Street
New Orleans, Louisiana 70130

Dear Ms. Esman:

This is in reference to your request for refund of the fee submitted by Southern Starr of Arkansas, Inc. (Southern), with its petition for rulemaking seeking a change in the community of license of KOLL(AM) from Pine Bluff, Arkansas to Maumelle, Arkansas.

You state that a refund is due because Southern's petition was filed on May 16, 1990, prior to the implementation of the fee requirement for petitions for rulemaking. You contend that the imposition of a fee in these circumstances would constitute retroactive rulemaking.

The rulemaking fee was part of a package of new and revised filing fees contained in the Omnibus Budget Reconciliation Act of 1989 (1989 Budget Act), Pub. L. No. 101-239, 101 Stat. 2106, codified at 47 U.S.C. § 158 (1989), signed into law on December 19, 1989. Effective May 21, 1990, the Commission adopted rule changes to implement the Budget Act. In the Matter of Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558 (1989) (Fees II). The Commission therein determined that the rulemaking fee would be payable after the conclusion of the rulemaking proceeding, upon application for change in the station's operations. 5 FCC Rcd at 3659-60.

We have determined that the fee requirement should apply to all cases in which a petition for rulemaking was filed after the effective date of the Commission's implementation of the Budget Act's requirements (May 21, 1989). As of that date, potential petitioners clearly had notice that rulemaking requests to change or upgrade a station channel or change its community of license were subject to the fee requirement.

Accordingly, because Southern filed its petition before the effective date of the fee requirement, your request is granted.

A check, drawn in the amount of $1,565 and made payable to Southern Starr of Arkansas, Inc., will be forwarded to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 6 - 1992

Mr. Robert B. Taylor
WEXI(AM)
500 N. Delaware Blvd.
Jupiter, FL 33458

Dear Mr. Taylor:

This is in response to your request for refund of hearing fee incorporated in your "Voluntary Withdrawal of Renewal Application" for AM radio broadcast station WEXI(AM), Jupiter, Florida.

You state that you are the licensee of WEXI(AM) and that you tendered a hearing fee in the amount of $6,760 on July 19, 1991. You further state that the renewal of WEXI(AM) is still pending designation for hearing. You now request that your renewal application be dismissed and your hearing fee be refunded to you.

In a recent decision, the Commission stated that "refunds of the hearing fee paid prior to designation will be available to applicants that are dismissed, voluntarily or involuntarily, before an HDO is issued or granted without being designated for a comparative hearing." See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, 158 (1990), recon. gtd. in part, 6 FCC Rcd 3403 (1991). This aspect of the decision was reiterated on reconsideration. See 6 FCC Rcd at 3403. Because you have voluntarily dismissed your renewal of WEXI(AM) prior to designation for hearing, see Mass Media Bureau Letter, 8910-MAG, released January 30, 1992, your request for fee refund will be granted.

Accordingly, a check for $6,760, payable to Robert B. Taylor, will be forwarded to you at 500 N. Delaware Blvd, Jupiter, Florida, 33458 at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section, at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 6 - 1992

William E. Zimsky, Esq.
Taylor & Zimsky
P.O. Box 4117
Incline Village, Nevada 89450

Dear Mr. Zimsky:

This is in response to your request for a refund of the hearing fee submitted on behalf of WNPC, Inc. (WNPC), the successful applicant for a new FM station at Newport, Tennessee.

You state that the Hearing Designation Order in this case (DA 91-778, released July 25, 1991) specified an environmental issue against WNPC and requested certain information not provided in the application. You further state that WNPC tendered its $6,760 hearing fee along with the Notice of Appearance. You recite that the ALJ subsequently granted WNPC's Motion to Delete the Environmental Issue, accepted WNPC's amendment providing information in response to the HDO and approved the settlement agreement dismissing a competing application and granting that of WNPC. See Memorandum Opinion and Order, FCC 91M-2912, released September 24, 1991.

You correctly note that the environmental issue and the supplementary information required by the Hearing Designation Order meant that WNPC's application was not "immediately grantable." See 47 C.F.R. §1.1111(c)(1). Previously, the "resolution of [such] matters specified in the designation order" would preclude refund of the hearing fee. See id. However, the Commission recently decided that retention of the hearing fee "whenever the sole surviving applicant had to satisfy a directive specified in the designation order is no longer warranted." Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 6 FCC Rcd 5919, 5925 (released October 10, 1991).

Accordingly, your request for a refund is granted. A check for $6,760, payable to WNPC, Inc., will be forwarded to you at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section, at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 3 - 1992

Arthur V. Belendiuk, Esquire
Smithwick & Belendiuk, P.C.
2033 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Belendiuk:

This is in response to your request for reinstatement, nunc pro tunc, of the application filed by Mr. John H. White for a new FM station at La Crosse, Wisconsin.

You request a waiver of the Commission's requirement that its fees be paid in a timely fashion and reinstatement, nunc pro tunc, of his application because a clerical error prevented the timely payment of the hearing fee.

Under the Commission's revised policy concerning the submission of hearing fees, applicants with mutually exclusive broadcast applications are required to file their hearing fees by a date certain prior to the designation of the competing applications for hearing. See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, 158 (1991). Mr. White's application was accepted for filing before the effective date of the new policy and, therefore, the Public Notice announcing its acceptance was silent concerning the filing of his hearing fee. However, Mr. White and all other applicants whose pending mutually exclusive applications were accepted for filing before February 13, 1990 were made subject to the revised hearing fee payment requirement. Id. Subsequently, by Public Notice, these applicants were provided notice that their required hearing fees were due by July 15, 1991.

You request reinstatement of Mr. White's application, nunc pro tunc, because Mr. White's fee payment was not timely filed due to a clerical oversight. As you recognize, all pending applicants, including Mr. White, received notice of the Commission's revised procedures concerning the payment of hearing fees. In this regard, the Commission's rules place the burden of compliance with the fee requirements on the applicant. Moreover, the Commission's rules do not provide for nunc pro tunc reinstatement if a hearing fee or other required fee payment is untimely made due to reasons within an applicant's control. Rather, the Commission's rules have explicitly limited the circumstances upon which an application would be reinstated nunc pro tunc. See 47 C.F.R. § 1.1114(a)(2). In this instance, we can find no basis for waiver of the filing requirements.

Finally, by letters, dated October 4, 1991 and October 12, 1991, Mr. White requested the immediate refund of his fee payment and, subsequently, requested that the Commission retain his fee because he had been informed that his application might be reinstated. However, we are unaware of any pending action which might cause Mr. White's application to be reinstated.

In view of the foregoing ruling, your request for reinstatement is denied. Therefore, a check, drawn in the amount of $6,760.00 and payable to John H. White, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

*U.S. Government Printing Office: 1992 — 312-024/60012